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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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JOHN PATTERSON, *et al.*,

*Petitioners,*

v.

NEWSPAPER AND MAIL DELIVERERS UNION, *et al.*,

*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Nos. 1476, 1480 -- August Term, 1992
Docket Nos. 92-7964, 6242

United States Court of Appeals
Second Circuit

JOHN R. PATTERSON, ROLAND J. BROUSSARD, ELMER STEVENSON, on their own behalf and on behalf of all other persons similarly situated, and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs-Appellants,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants-Appellees.

Argued June 21, 1993
Decided December 20, 1993.

Before: NEWMAN, Chief Judge,
VAN GRAAFEILAND and ALTIMARI, Chief Judges.

Appeal from the July 30, 1992, order of the United States District Court for the Southern District of New York (William C. Conner, Judge) vacating a consent decree originally approved in 1974, 797 F. Supp. 1174 (S.D.N.Y. 1992).

AFFIRMED

JON O. NEWMAN, Chief Judge:

This appeal primarily concerns the appropriate standard for modification of a consent decree in litigation not involving a governmental entity as a party. The Equal Employment Opportunity Commission ("EEOC") and a class of minority employees appeal from the July 30, 1992, order of the District Court for the Southern District of New York (William C. Conner, Judge). vacating in its entirety a consent decree originally approved in 1974. *Patterson v. Newspaper & Mail Deliverers' Union*, 797 F. Supp. 1174 (S.D.N.Y. 1992). The decree created a comprehensive affirmative action program for New York City area Newspaper Deliverers. In addition, the decree contains broad prohibitions against discrimination and provides for an Administrator to enforce the anti-discrimination and affirmative action provisions. On appeal, EEOC and the minority employee class represented by the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), contend that the District Court applied the wrong standard in deciding whether to modify any aspect of the decree. LDF argues that none of the decree should have been vacated; the EEOC argues that the District Court erred in vacating the anti-discrimination provisions, but takes no position with respect to the affirmative action program and the Administrator.

We conclude that the District Court applied the correct standard and was entitled to vacate the entire consent decree since its essential purpose had been achieved. We therefore affirm.

*Background*

Through closed and union shop agreements, defendant Newspaper & Mail Deliverers' Union ("the Union") controls access to newspaper and publication delivery jobs in the New York City region. From 1901 to 1952, the Union limited membership to the legitimate first-born sons of other Union members. In 1952, the Union abandoned its primogeniture system, and, with the cooperation of the New York City area newspapers and

publishers, adopted a new series of membership and work rules. This system divided workers into those holding permanent jobs, which are said to have "regular situations," and those employed irregularly, who are called "shapers." The shapers were further divided into groups with descending daily hiring priority. Each employer maintained a "Group I" list, which was restricted to persons who had once held regular situations in the industry. After offering daily work to each person on the Group I list, the employer next looked to an industry-wide Group II list, which consisted of all persons in the industry on Group I lists or holding regular situations. Thus, Group II provided an opportunity for deliverers to supplement their income at an employer other than their usual employer. If additional daily work was available, the major employers would look to a Group III list, which consisted of persons who appeared for daily work a minimum number of times per week, even if no work was available. Union membership was limited to persons holding regular situations, and minorities were discouraged from joining the Group III lists. Moreover, although by contract the group lists provided the basis for filing vacant regular situations, various abuses made it nearly impossible for anyone to move from Group III to a regular situation. The Union allowed employees at one employer to shift to the Group I list of another employer and occasionally provided Group I status to relatives and associates of Union members.

In 1973, EEOC and a group of minority deliverers, who sued for themselves and others similarly situated, brought separate actions against the Union and the employers under Title VII of the 1964 Civil Rights Act. They contended that the 1952 system, although facially neutral, perpetuated discrimination against minorities. The cases were consolidated and brought to trial before then-District Judge Pierce. After all the evidence was presented, but before the District Court ruled, the parties entered into a settlement agreement, which Judge Pierce approved and

incorporated into a final judgment. *Patterson v. Newspaper & Mail Delivers' Union*, 384 F. Supp. 585 (S.D.N.Y. 1974). The judgment directs the Union and employers to implement and perform the agreement, and retains jurisdiction in the District Court for enforcement and any subsequent applications. In a written opinion, Judge Pierce made detailed factual findings of a long-established pattern of discrimination against minorities. Statistically, minorities accounted for 30 percent of the eligible workforce, and only two percent of deliverers (with an even smaller percentage among regular situation holders and Group I members). We affirmed Judge Pierce's decision over the objection of White Group III deliverers who complained that the agreement unfairly favored minorities. *Patterson v. Newspaper & Mail Deliverers' Union*, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976).

The settlement agreement contains five sections. The introductory section consists of a series of "whereas" clauses, stating that there has been no admission of a violation of law but acknowledging the existence of a "statistical imbalance" in minority representation. The final clause of this section states that the agreement "is designed to correct the aforesaid statistical imbalance, to remedy and eradicate its effects, and to put minority individuals in the position they would have occupied had the aforesaid statistical imbalance not existed." Section A of the agreement consists of broad prohibition against any action with a discriminatory effect by either the Union (¶ 1) or employers (¶ 2). Section B of the agreement creates the office of the Administrator. The Administrator is authorized to resolve all complaints involving disparate treatment, subject to review by the District Court (¶ 4). His term is fixed as "an initial period of five (5) years"; subsequently he or his successor "shall remain in office if and for such time as the Court may direct" (¶ 6).

Section C of the agreement is a detailed affirmative action program. The purpose of the program is to achieve

"a minimum goal of 25% minority employment in the industry . . . by June 1, 1979" (¶ 7), although the following paragraph states that this level "is not an inflexible quota but an objective" (¶ 8). To achieve this goal, the agreement provides that all minorities currently in Group III are to be moved up immediately to Group I (¶ 9); that regular situation positions are to be filled exclusively from Group I by seniority (¶ 10); that for each regular situation filled, one Group III deliverer will move up to Group I, alternating between the most senior minority and most senior nonminority (¶ 11); and that Group III vacancies are to be filled with three minorities for every two nonminorities (¶ 15). Various other provisions establish slight variations for certain employers (¶¶ 12-13), impose some special one-time rules (¶ 14), limit transfers (¶¶ 18-19), and require the Union to offer membership to anyone in Group I (¶ 20).

Finally, section D of the agreement, entitled "general provisions," require employers to help qualified individuals apply for employment (¶ 28), regulates employment applications (¶ 29), requires compliance reports (¶¶ 30-31), provides for backpay to certain members of the class (¶¶ 37, 39), and provides for continued jurisdiction in the District Court (¶ 4). The only provision in section D that arguably contemplates the termination of the agreement is paragraph 33, which states that inconsistent provisions in collective bargaining agreements are suspended, but "may be put into effect when the order terminates, unless the Court orders otherwise."

By 1979, minority employment was only 13.3 percent, and Judge Pierce ordered the office of the Administrator extended for another five years. *Patterson v. Newspaper & Mail Deliverers' Union*, 23 Empl. Prac. Dec. (CCH) ¶ 31,001 (S.D.N.Y. 1980). In 1984, the office was extended on an indefinite basis. In 1985, the defendants moved to terminate the order embodying the settlement agreement on the ground that the 25 percent goal had been reached. In 1987, Judge Conner, to whom the case has been reassigned, found

that while some employers had reached 25 percent minority employment, the goal of the settlement agreement was industry-wide minority representation of 25 percent. Judge Conner deferred further consideration of the motion until there was sufficient evidence that this goal had been attained. In November 1988. Judge Conner concluded that there was sufficient evidence to suspend operation of the two ratios in the affirmative action program (*i.e.*, the 50 percent quota for filling Group I vacancies and the 60 percent quota for filling Group III vacancies) pending resolution of the motion.

In May 1991, the Interim Administrator submitted a report finding an industry-wide fig. e of 28.53 percent and substantial compliance by most employers. After the plaintiff's declined to challenge this figure, the District Court scheduled a hearing on vacating the entire order. The private plaintiff's opposed vacation of any part of the decree. EEOC did not oppose termination of the affirmative action program, but argued that paragraphs 1, 2, 20, 28, 29, 33, and 41 of the settlement agreement should be retained.

In a comprehensive opinion dated July 8, 1992, Judge Conner concluded that the order should be vacated in its entirety. He ruled that modern cases have established a flexible standard for vacating consent decrees, and that this standard allowed termination of a decree once its primary purpose had been attained. He rejected the private plaintiffs' argument that the decree had to remain in force until every facet of discrimination was eliminated, and rejected the EEOC's argument as a "cut and paste approach." Plaintiffs filed a motion to amend the judgment under Fed. R. Civ. P. 59(e), which was denied. However, the District Court modified its earlier order so as to allow discrimination claims filed with the Administrator prior to July 8, 1992, to be processed.

*Discussion*

I. *Legal standard for modification of a consent decree*

EEOC primarily contends that the District Court erred in applying a flexible standard for modification of the consent decree instead of applying a more rigorous standard. The rigorous standard urged by EEOC dates from *United States v. Swift & Co.*, 286 U.S. 106 (9132), in which the Supreme Court held that an antitrust consent decree could not be modified unless the defendant showed that the dangers leading to implementation of the decree had become "attenuated to a shadow," *id.* at 119. The Court also held that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." *Id.*

The adoption of a more flexible standard was intimated in *United States v. United Shoe Machinery Corp.*, 391 U.S. 241 (1968), in which the Supreme Court cautioned that the "grievous wrong" standard should not be read out of context, and allowed the United States to obtain modification of an antitrust injunction in order to strengthen restrictions on the defendant. The seminal case actually applying a more flexible standard is *New York State Association for Retarded Children, Inc. v. Carey.*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983). Judge Friendly's opinion read *Swint's* "grievous wrong" language as limited to the special facts of that case, and found that the appropriate standard, at least in an institutional reform case, was one of flexibility, leaving to the District Court a "rather free hand," *id.* at 970. Two recent Supreme Court cases have held that district courts erred in applying *Swift*, rather than a more flexible standard, to the modification of consent decrees or injunctions in institutional reform cases. In *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), the Court held that a finding that a school district was operating constitutionally and unlikely to return to its past ways mandated the termination of a desegregation order. In *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748 (1992), the Court held that any showing of a significant

change in factual conditions or law would justify a modification of a decree enjoining double bunking and requiring officials to build a new prison; the Court remanded for consideration of whether an upsurge in prison population had been unforeseen.

In the pending case, the District Court rejected EEOC's contention "that this case is governed solely by . . . *Swift*", 797 F.Supp. at 1179, and looked to the flexible standard of *Dowell* and *Rufo*. In an important footnote, Judge Conner noted that though the flexible standard had previously "only been invoked in cases where the conduct of a governmental facility or operation was being regulated," the present case sufficiently implicated "the public's right in seeing that persons are not deprived of fundamental rights" to come within the "institutional reform exception." *Id.* at 1180 n.8.

EEOC is probably correct that the District Court's decision is the first to explicitly adopt the flexible standard of *Dowell* and *Rufo*, rather than the rigorous standard of *Swift*, in a case not involving a governmental entity. It is also true that the recent Supreme Court cases have each, to an extent, invoked federalism and democratic rule concerns as a justification for their use of a flexible standard in the context of institutional reform litigation, *see Rufo*, 112 S.Ct. at 758-59; *Dowell*, 111 S.Ct. at 637. But *New York State Association* makes a more general argument for the flexible standard, based on the difficulties in implementing any complex decree in the institutional setting, *see*, 706 F.2d at 969-70, and the discussion of *Swift* in each of the leading cases, as well as in *United Shoe*, suggest that *Swift* is a special case that should not be read as setting down a general standard for all future cases. *See Rufo*, 112 S.Ct. at 758 ("Our decisions since *Swift* reinforce the conclusion that the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees."); *Dowell*, 111 S.Ct. at 636; *United Shoe*, 391 U.S. at 248; *New York State Association*, 706 F.2d

at 968-69. Moreover, we have suggested in a post-*Rufo* decision, *Still's Pharmacy, Inc. v. Cuomo*, 981 F.2d 632 (2d Cir. 1992), that *Rufo* constitutes a wholesale change, not limited to institutional reform cases. *See id.* at 636-37 (citing District Court decision in this case for approval).

Among other circuits, there appears to be some dispute as to the appropriate standard for modifying consent judgments. The Seventh Circuit has flatly declared that *Rufo* gave the "*coup de grace*" to *Swift*, noting that although *Rufo* involved institutional reform litigation, the 'flexible standard' . . . is no less suitable to other types of equitable case." *In re Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993). Three circuits have said that *Swift's* strict standard has been relaxed in institutional reform litigation, *Lorain NAACP v. Lorain Bd. of Education*, 979 F.2d 1141, 1149 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2998 (1993); *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 799 F.2d 558, 562 (Fed. Cir. 1992); *Epp v. Kerrey*, 964 F.2d 754, 756 (8th Cir. 1992), but two of these courts have not considered the appropriate standard in public issues litigation not involving a governmental entity, *see Lorain NAACP*, 979 F.2d at 1149; *Epp*, 964 F.2d at 756, and one merely declined to apply the flexible standard to traditional commercial litigation, *W.L. Gore*, 977 F.2d at 562.

We agree with Judge Conner that the flexible standard outlined in *Dowell* and *Rufo* is not limited to cases in which institutional reform is achieved in litigation brought directly against a governmental entity. The "institution" sought to be reformed need not be an instrumentality of government. If a decree seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate significant rights of a public nature, it is appropriate to apply a flexible standard in determining when modification or termination should be ordered in light of either changed circumstances or substantial attainment of the decree's objective. Decrees in this context typically have effects beyond the parties to the lawsuit, as is true of the provisions for affirmative action

remedies in this case. Though it is important to make sure that agreements in such litigation are not lightly modified, it is also important to enter into constructive settlements so that protracted litigation can be avoided and useful remedies developed by agreement, rather than by judicial command. There is an inevitable tension between the objectives of promoting adherence to agreements and of fostering a climate in which constructive settlements may be readily reached. For plaintiffs, the certainty that an agreement will be enforced without modification is an incentive to negotiate a settlement that achieves some, though not all, of what might have been obtained in litigation. For defendants, however, it is the prospect of modification as circumstances change or objectives are substantially reached that provides the incentive to settle on reasonable terms, rather than adamantly resist in a protracted litigation. The tension between these competing objectives cannot be eliminated, but it can and should be sensitively adjusted by courts of equity, exercising their historic powers both to provide remedial relief and, when appropriate, to terminate their authority. We therefore agree with Judge Conner that it was appropriate to apply a flexible standard in determining whether to dissolve the decree.

2. *Application of the standard*

In considering the District court's decision to vacate the entire decree, it will be convenient to focus initially on the affirmative action provisions of the decree. Only the LDF contends that these provisions should be retained. LDF does not dispute that minority representation has reached 25 percent, nor even the District Court's finding that minority representation is likely to increase since many white employees with regular situations are near retirement age and the Group I and Group III lists contain greater than 25 percent minority representation. LDF also does not dispute that it would have been proper to suspend the fixed quotas had the defendants achieved the 25 percent goal by 1979. But LDF contends that the defendants' failure to meet that

goal by 1979 requires (a) setting a new goal now, commensurate with the percentage of minorities in the qualified workforce, and (b) retaining the hiring quotas until the new goal is met. LDF states that the 1980 census showed that minorities constituted 42 percent of the workforce, and that the 1990 census shows a figure of more than 50 percent.

LDF relies on *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991), in which the Sixth Circuit reversed the termination of a consent decree and remanded to the District Court for further consideration of whether a higher affirmative action goal should be set after the defendant failed to meet the goal within the deadline set in the decree. The decree in that case stated that it was intended to achieve a "workforce composition which will not support any inference of racial discrimination in hiring." *Id.* at 961. The consent decree in this case could perhaps be read to support a similar goal. The decree states that it is intended to remedy a "statistical imbalance," and it is clear that the 25 percent figure was chosen with reference to the 1970 census figure of a 30 percent minority workforce. Nevertheless, the decree does not suggest that its purpose is to achieve total parity, and the 25 percent figure, as a numerical goal, is stated in absolute terms, without any suggestion that it is subject to modification. Indeed, the decree suggests that if any factor is flexible, it is the time limit. Paragraph 6 allows extension of the office of Administrator beyond five years, and paragraph 8 states that the 25 percent goal "is not an inflexible quota but an objective to be achieved by the mobilization of available personnel and resources of the defendants hereto in a good faith effort to maximize employment opportunities for minorities." Both the difficulty of achieving 25 percent goal and the likelihood that the percentage of minorities in the blue collar workforce would increase were foreseeable in 1974. Whether or not the District Court might have had discretion to raise the 25 percent figure as a remedy for not meeting it is originally

contemplated, the Court was surely entitled to conclude that such an increase was not required. Finally, with no increase in the percentage goal, it was proper to dissolve the 50 percent quota for promotions from Group III to Group I and the 60 percent quota for listings in Group III.

Once the District Court decided that achievement of the 25 percent goal justified elimination of the affirmative action provisions, without any increase in the percentage, it then had to decide whether to vacate the entire decree. Though other portions of the decree provide the plaintiff class with enforcement mechanisms for redressing any ongoing discrimination that may be more expeditious than the initiation of new litigation, we agree with Judge Conner that the decree has served its purpose, and that all of its provisions may be ended. Again, we do not decide that the District Court was required to vacate these additional provisions, only that it was entitled to do so. Application of the flexible standard for modifying decrees in the context of this lawsuit seeking broad remedies to change hiring practices entitles a court of equity to focus on the dominant objective of the decree and to terminate the entire decree once that objective has been reached.

Affirmed.

Docket Nos. 92-7964, 6242

United States Court of Appeals
Second Circuit

JOHN R. PATTERSON, ROLAND J. BROUSSARD; ELMER STEVENSON, on their own behalf and on behalf of all other persons similarly situated, and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs-Appellants,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants-Appellees.

Filed February 7, 1994

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States courthouse in the City of New York on the 7th day of February one thousand and ninety-four.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant JOHN PATTERSON, ET AL.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE, III, Clerk
By:

_____
Carolyn Clark Campbell
Chief Deputy Clerk

Nos. 73 Civ. 3058 and 73 Civ. 4278

Sept. 19, 1974

United States District Court
S. D. New York

JOHN R. PATTERSON, *et. al.*

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

Supplemental Opinion Oct. 11, 1974

*MEMORANDUM OPINION AND ORDER*

PIERCE, District Judge

This memorandum approves a settlement reached by all of the parties after a four-week trial on the merits of two consolidated actions charging employment discrimination in the newspaper and publication delivery industry in the New York City area. The provisions of the agreement are intended to achieve a 25% minority[1] employment goal in the

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[1]"Minority" as it is used in this Settlement Agreement refers to the definition of that word by the Equal Employment Opportunities (continued...)

industry within five years. At the present time, minority employment in the industry is less than 2%; the comparable percentage of minorities in the relevant labor force in the New York City area is approximately 30%. The agreement also provide for supervision of hiring practices and employment opportunities in the industry to the benefit of both minority and non-minority workers.

One of the actions has been brought by the Equal Employment Opportunity Commission (EEOC) and names as defendants the Newspaper and Mail Delivery Union of New York and Vicinity (the Union), the New York Times (Times), the New York Daily News (News), the New York Post (Post) and some fifty other publishers and news distributors within the Union's jurisdiction. The other action is a private class action on behalf of minority persons. Both actions charge that the Union, with the acquiescence of the publishers and distributors, has historically discriminated against minorities and that the present structure of the collective bargaining agreement combined with nepotism and cronyism and other abuses in employment and referral practices, have perpetuated the effects of the past discrimination, in violation of 42 U.S.C. § 2000 *et. seq*. (Title VII). Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in this industry but for the alleged discriminatory practices.

Both actions were filed in 1973. After months of negotiation, the parties reached a settlement agreement in early 1974 but it was rejected by vote of the Union's membership. Following another abortive attempt to obtain ratification from the membership, the two actions were consolidated with each other for a hearing on motions for

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[1](...continued)
Commission and means people who are Black, Spanish-surnamed, Oriental and American Indian.

preliminary relief before this Court. The hearing commenced May 14, 1974. At its conclusion on June 12, 1974, the Court ordered the hearing consolidated with trial on the merits, pursuant to Fed.R.Civ.P. 65(a)(2), giving the parties the opportunity to present further evidentiary submissions or testimony. No further evidence was presented. Instead, the parties having once again entered into settlement discussions, brought before this Court for approval a Settlement Agreement dated June 27, 1974, entered into by all the plaintiffs and all the defendants, and ratified by the Union membership.

A hearing on the fairness, adequacy and reasonableness of the Settlement with respect to the plaintiffs' class was held on August 27, 1974, after due notice to that class. On the same date the Court also held a separate hearing on the legality of the relief provided in the Settlement and its impact on a group of non-minority workers who had, prior to trial, been permitted to intervene in the consolidated actions for the purpose of challenging any affirmative relief which might have affected their interests.

*The Standards*

As a general proposition, when a settlement agreement is presented to the Court for approval, the Court's role is limited to the exercise of its equitable powers. The Court is not to substitute its judgment for that of the parties. *See, e.g.. Glicken v. Bradford*, 35 F.R.D. 144, 151 (S.D.N.Y. 1964); *United States v. Carter Products, Inc.*, 211 F. Supp. 144, 148 (S.D.N.Y. 1962). Instead, its role is to assure that the settlement is fair to the class and the parties, and represents a reasonable resolution of the dispute. *See e.g., State of West Virginia v. Chas. Pfitzer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert, denied*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). Ordinarily, the Court is not expected to examine conclusively into the underlying facts or legal merits of the action. *See, e.g.,*

*Newman v. Stein*, 464 F.2d 689, 691 (2d Cir.), *cert. denied*, 409 U.S. 1030, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972); *United States v. Carter Products, Inc., Supra*, 211 F. Supp. at 148.

But, this is not an ordinary case, it must be recognized that efforts to correct discrimination affect the strongest public sensitivities. The interests involved are far broader than those of the particular parties in a particular lawsuit. Therefore, the parties cannot be permitted to settle for less than, or for more than, the facts of the case and public policy expressed in Title VII mandate. Thus, although the Court is of the opinion that even at this late stage public policy is served by an agreement rather than an adjudication, a more searching discussion of the merit is warranted. In fact, the state of the law in this Circuit may require certain findings of fact to support affirmative action in a Title VII case even when it is resolved by settlement. *See, Ross v. Enterprise Association Steamfitters Local 636*, 501 F.2d 622, 628 n.4 (2d Cir. 1974), explaining *United States v. Wood, Wire and Metal Lathers International Union*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973). Further, a more conclusive examination of the merits is necessary in this case because the affirmative action program and the minority goal in principle, and the 25% minority goal are all vigorously disputed by the intervenors.

Inasmuch as this Court has heard a four-week completed trial in these actions, it is in a unique position to find facts and to set forth conclusions of law. Therefore, what follows shall constitute this Court's findings and conclusions to the extent that they form the necessary legal support for the affirmative action proposed.

*The Background*

Most of the facts are not contested. The Union is the exclusive bargaining agent for a collective bargaining unit encompassing the work performed in the deliverers' departments of newspaper and publication distributors in the

New York area. Its geographic jurisdiction has been variously stated, but it is fair to define it by where the employers in the industry are located: in the metropolitan area of New York City (within a fifty mile radius of Columbus Circle), the New York counties of Nassau and Suffolk, the New Jersey counties of Bergen, Essex, Hudson, Middlesex, Monmouth, Passaic and Union, and the Connecticut county of Fairfield.

The nature of the delivery industry is such that the employers' needs for delivery department employees vary from day to day, and indeed, shift to shift, depending upon the size and quality of the publication(s) being distributed. Thus, each employer by the terms of the Union contract, maintains a regular work force (Regular Situation holders) for its minimum needs, and depends upon daily shapers to supplement the force. By the terms of the contract, at the major employers the shapers are categorized into groups with descending daily hiring priorities. The Group I list of shapers is restricted, by contract, to persons who have at one time held a Regular Situation in the industry. They have first shaping priority at every shift, in order of their shop seniority. After the Group I is exhausted at any given shift, the contract provides that the next hiring priority shall go to Group II members. Group II consists of all persons in Group I and all persons holding Regular Situations in the industry. Once all of the Group II members who have appeared for the shape are put to work, the contract provides that the remaining open jobs, if any, will go to Group III members who have appeared for the shape, in order of their shop tenure.

The shaping system is considerably less structured for the smaller publications and distributors, and, in fact at the this time, only the News and the Times maintain Group III lists of any significant size.

All of the jobs in the industry are within the Union's jurisdiction, whether performed by Regular Situation holders

or by any of the members of the various groups, or any one who shapes at all. The jobs are essentially the same, regardless of the status of the worker who fills them, and are all relatively unskilled. Most workers drive trucks or do floor work. However, because the contract provides that a Regular Situation is a prerequisite to Union membership, only Regular Situation holders and members of Group I and II are Union members.

In theory at least, in addition to structuring the daily hiring priorities, the Group system also represents the priority list for filling Regular Situations as they may become vacant in the newspapers shops.

The Union was founded in 1901, long before the present Group structured contract was in existence. There is no evidence to indicate that at that time it had any minority members (as that term is defined today). Historically it virtually limited membership to the first born legitimate son of a member. The industry had a closed shop and Union members were consistently hired before non-Union men at all industry shapes. In 1952, the industry adopted the contract which included the rudiments of the Group structure described above.

It is abundantly clear that the nepotistic policy of the Union prior to 1952 resulted in discrimination against minorities. *See, e.g., Rios v. Enterprise Association Steamfitters Local 638, supra*, 501 F.2d 622. *United States v. Wood Wire and Metal Lathers International Union*, 328 F. Supp. 429, 432 (S.D.N.Y. 1971). The fact that the Union's intent was not to discriminate against minorities, but to prefer Union members and their sons, does not change the basic conclusion. The effect of such policies, deliberate or not, was to foreclose minorities from employment in the industry. It is the discriminatory *effect* of practices and policies, not the underlying intent, which is relevant in a Title VII action.

The Group structure, instituted in 1952, appears on

its face to discard these discriminatory policies and to open up regular employment opportunities and Union membership to the entire labor force. But, there is uncontroverted evidence that certain relevant provisions of the contract have been administered haphazardly, and that the Group structure has been circumvented by friends and family of Union members. In practice, the fact is that no non-Union Group III shaper in the industry has achieved a Regular Situation, and thus Union membership, by moving up the Group system since 1963.

Testifying at trial, the Union president credibly asserted that the Union was not motivated by any intent to discriminate against minorities, but went on to say that, "I would be the first to admit that we favor and we are partial to our members and I'm not ashamed of that." This attitude is, of course, admirable under most circumstances. There would be nothing unlawful about its effect under Title VII providing that minorities, historically, had been provided free and equal access to Union membership. But the facts indicate that such is not the case here. And even without evidence of abuse of the Group system, the statistics alone reveal the present situation.

There are presently some 4,200 members of the Union, including some 900 pensioners. More than 99% of these Union members are White (non-minority).

There are, at present, a total of 2,855 persons actively working in the industry -- this includes Regular Situation holders (2,460), Group I members (123), and Group III members (272).[2] Of the total in these categories, 70 persons -- 2% are Black, Spanish-surnamed, Oriental or American Indian. Of the 70 minority persons, 28 are scattered among

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[2]Group II is not counted here because Group II is constituted of persons who also hold Regular Situations or Group I positions in the industry. They are permitted by contract to shape in any shop other than their own, in addition to their regular job.

the smaller publishers and distributors; 24 work at the News where the force is approximately 900; work at the Times where the force is approximately 400; and 1 works at the Post where the force is approximately 318.

These figures demonstrate that 20 years after the industry instituted a neutral Group structure of employment and hiring priorities, the participation of minorities in this industry is still grossly disproportionate to the percentage of minority workers in the relevant labor force, which the EEOC suggests is approximately 30%.[3] Even allowing for the fact that the industry has seen many newspapers disappear in these last two decades, with a concomitant loss of jobs, the clear inference from these statistics is that abuses of the Group structure and indeed the Group structure itself, is serving -- however unintentionally -- to "lock in" minorities at the non-Union entry level of the industry, and to thereby perpetuate the impact of past discrimination on the minorities with whom these Title VII actions ar concerned. It is this present impact of past practices which justifies the affirmative corrective relief embodied in the Settlement Agreement. *See, Griggs v. Duke Power Co.*, 401 U.S 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Rios v. Enterprise Association Steamfitters Local 636, supra, United States v. Wood, Wire and Metal Lathers International Union, supra*; *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971).

*The Terms of the Agreement*

As with many resolutions of employment discrimination cases, the Settlement Agreement in these actions contains general provisions permanently enjoining the defendants from discriminatory practices in violation of Title VII. And, like the judgment in *Rios*, 360 F. Supp. 979 (S.D.N.Y. 1973) and the agreement in *Wood, Wire* (68 Civ.

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[3]See p. 593 [pp. 28a-29a of this Appendix].

2116, S.D.N.Y. Feb. 25, 1970), this Settlement Agreement sets forth a minority employment goal. In this case, it is for 25% minority employment in the industry within five years.[4] But, unlike *Rios* and *Wood, Wire*, this Settlement Agreement does not merely commit the parties to the future development of a plan to achieve that goal. Instead, it sets forth a plan with great specificity, including variations on the general theme to account for varying circumstances between different employers. Such detail indicates that the plan is the result of hard, serious and good faith negotiations, and that the different pressures, perspectives and interests of the parties have been confronted and already resolved. This serves to increase the Court's confidence that the plan is workable, and can be implemented immediately.

The plan is built upon the outline of the present Group priority structure of the collective bargaining agreement. It provides for an administrator whose duties include not only close supervision of the plan, but also of employment opportunities in the industry on behalf of all workers. Its major features include elimination of past abuses of the Group system; elimination of the contract provision which restricted Group I to former Regular Situation holders; provision for an orderly flow of Group III shapers -- alternating one minority person with one non-minority person -- into steady and secure employment in the industry, first as members of Group I and from there, as Regular Situations become vacant, to Regular Situations. Union membership will be offered to each Group III worker as he reaches the bottom of Group I. The plan further provides that until the 25% minority employment goal is achieved, employers shall hire, at the entry level, three

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[4]The parties have defined "employment" as encompassing Regular Situations and Group I positions. Their view is that a place in either of these two groups represents a steady, secure job in the industry. The Court agrees, at this time. The definition is subject to revision by terms of the Settlement Agreement.

minority persons for every two non-minority persons. In addition, minorities who are presently active on Group III at the News and the Times will immediately move to the bottom of the Group I list, with an equal number of non-minorities to immediately follow them into the Group I list. These minorities will be given pension benefits they would have earned but for the disadvantages they have encountered. With the same purpose, funds have been established by the defendants to provide back pay awards chiefly to these persons.

*The Intervenors' Objections*

The Group III list the News numbers 178. Scattered throughout the list, in terms of tenure, are 13 minority persons. the intervenors purport to speak for the other 165 persons on the list, and more broadly for all non-minority, non-Union workers in the industry.

Most of the provisions of the Settlement Agreement are applauded by the intervenors, as well they might be. By regulating employment opportunities in the industry, unlocking Group III and Group I, Regular Situations and Union membership, the Agreement will operate beneficially for the intervenors as well as for the minorities.

The focus of their objection is on the order of the flow from Group III to Group I. They assert that the flow ought to be in strict order of tenure on Group III. To immediately move all of the present Group III minorities to the Group I list ahead of some non-minorities who have been listed for a longer period of time on Group III, they assert, is to engage in "leap-frogging" not intended by Title VII. Further, they argue, that the system becomes even more onerous when the provisions for alternating minority /non-minority elevation to Group I go into effect, because after the few minorities who have any tenure in the shop are moved to Group I, the employer will be required to move minorities with no tenure at all ahead of some present

Group III non-minorities.

The facts selected by the intervenors in support of their objections are so. And, at first glance their frustration and anger with this Settlement Agreement is understandable, and their solution is appealing. These intervenors from Group III, as individuals, have also suffered the effects of the Union's nepotism; they have also attacked the present practices and abuses in other forums, under different statutes. Certainly this Court does not accept the argument that these particular men have benefited from a discriminatory system.

But, on deeper examination of the Settlement Agreement and the intervenors' objections, there are a number of reasons why this Court does not and indeed can not, view the intervenors as raising countervailing considerations of such a substantial nature as to preclude approval of the plan.

First and dispositive of all the issues raised by the intervenors, the Settlement Agreement simply does not trample on their employment opportunities. In the long run, it must be acknowledged by all concerned that the effect of this Agreement, if it operates as predicted, will be to achieve Regular Situation or Group I status for all members of Group III, minority and non-minority alike, within a relatively short time-span. Without this Settlement, Group III workers had little if any hope of ever achieving either status under the present system. The intervenors do not contend otherwise. Instead, their objections deal in the main with interim measures which do, in fact, move some minorities faster than some non-minorities. But it must be noted that once a Group III non-minority is elevated to Group I, his daily shaping opportunities will be no less than they presently are and indeed they may be greater. The News projections submitted to this Court indicate that within a month after implementation of the plan, the non-minority who is number 47 on the Group III list, and all non-

Minorities above him, will have been elevated to Group I. The progression thereafter is expected to be approximately 27 non-minority persons to Group I each year. Also the Settlement Agreement provides other benefits to Group III non-minorities, not the least of which is the appointment of an administrator who is empowered to assure that existing work opportunities in the industry shall be made available to any Group III person unable to get at least 45 shifts of work in any calendar quarter.

Further, even if the Settlement Agreement did not provide non-minorities with these benefits, the intervenors' position is not factually or legally sound. Their premise is that the Settlement Agreement will oust them from what they perceive as vested seniority rights in their Group III order. If, in fact, this Settlement Agreement affected firm and realistic seniority rights and expectation of innocent non-minority workers, there could be doubts as to the validity of the relief afforded. *See e.g., United States v. Bethlehem Steel Corp.*, 446 F.2d at 661. But in this case, regardless of the priority structure of the present contract, and the language which may be used in it the fact remains that Group III workers do not have full-time employment, nor do many of them have any great expectations or intention of working full-time while they shape from the Group III list. They are shapers. And, to the extent that the present contract structure, in theory, gives them certain priorities, by tenure on Group III, to achieve Regular Situations, the facts have demonstrated that they could not have any realistic expectation of such movement actually occurring. As noted above, no Group III worker has moved up the list to a Regular Situation since 1963.

Their expectations with respect to daily shape priorities must be viewed in a somewhat different light. Then an additional person is placed in front of a shaper, theoretically his chances of working any particular shift are decreased by a factor of one job. This, of course, depends on the stability of the total number of jobs available from

shift to shift and whether or not the new person chooses to shape the same shift. In other words, assessing a shaper's expectation is a highly speculative exercise. The Court does not mean to minimize a Group III member's vested emotional interest in his position at a shape, but it cannot be equated with the worker who might be "bumped" from a steady and seemingly secure position by an outside minority with less seniority than him. Further, it must be pointed out that even if these shaping priorities were viewed as providing firm expectations, "[such] seniority advantages are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification." *United States v. Bethlehem Steel Corp, supra*, 446 F.2d at 663. Indeed, the intervenors themselves recognize this principle when they approve of many changes made in the collective bargaining agreement by the proposed Settlement.

Also, it must be said that the relief the intervenors suggest, which would observe strict tenure of the Group III list, would most likely not provide the relief mandated by Title VII for minorities. Given the fact that the active work force at the News numbers 900 and includes only 24 minority persons, it would clearly take a far longer period of time to reach a goal of 25% minority employment. Because the minority percentage is so low, the same objection holds true if, as the intervenors have suggested, the Group I and Group III lists were dovetailed by shop tenure.

Finally, it must not be forgotten that this is a Title VII case. Such cases, as Judge Frankel has said in *Wood, Wire* are launched by statutory commands, rooted in deep constitutional purposes, to attack the scourge of racial discrimination in employment. . . . [a]nd we know that, in addition to the spiritual wounds it inflicts, such discrimination has caused manifold economic injuries, including drastically higher rates of unemployment and privation among racial minority groups." *United States v. Wood, Wire and Metal Lathers International Union, Local Union 46*, 341 F. Supp. 694, 699 (S.D.N.Y. 1972). Title VII

is an expression of a commitment to correct *minority* employment discrimination and, hopefully, the vast social consequences that flow from it and afflict the whole of the nation. The statute does not undertake to correct all forms of employment discrimination. Thus, to the extent that what the intervenors seek here is relief equal to that afforded minorities, it has no legal foundation, in this case. Under the law, relief here must be limited to victims of the kind of discrimination prohibited by Title VII. *United States v. Bethlehem Steel Corp., supra*, 446 F.2d at 665. There is no evidence and no assertion that the intervenors have been discriminated against on account of race, religion, color, sex, national origin, or because they have made charges, testified, assisted or participated in any enforcement proceedings under Title VII.

*The 25% Minority employment Goal*

There remains the requirement of *Rios v. Enterprise Association Steamfitters Local 638, supra*, 502 F.2d 622, for reliable factual support for the 25% goal. All of the parties have agreed to the figure. The EEOC has based its conclusion on relevant labor force statistics contained in the tables published by the United States Department of Commerce in a publication entitled *General Social and Economic Characteristics*, 1970 Census of Population, for the relevant geographic areas of the Union's jurisdiction. Using what this Court agrees is the most reliable profile possible of the candidate for deliverers' work, the EEOC has extracted figures for Black males over 16 years of age with a high school diploma or less. With considerable ingenuity, the agency has also extrapolated comparable figures for minorities other than Black. Added together they indicate that the relevant labor force is 30% minority. Although the private plaintiffs and the intervenors have submitted other calculations and bases with respect to minority representation in the relevant labor force, in this Court's view the EEOC analysis is the soundest and provides ample support for the 25% minority goal included in the Settlement

Agreement.

*Conclusion*

This Court has found that the affirmative relief provided in the Settlement Agreement is justified by the facts of this case. It has found that the 25% minority goal is supported by reliable statistics. It has found that the affirmative relief provides members of the plaintiffs' class and other minorities with an adequate, fair and reasonable route to their "rightful place" in this industry and that the Settlement Agreement is enforceable, legal and in the public interest. The Court has also found that the Settlement Agreement does not so interfere with the rights of the intervenors as to require disapproval.

Therefore, the motion of the parties for approval of the Settlement Agreement is hereby granted. Settle Order, upon the consent of the parties endorsed thereon by their attorneys, accordingly.

So ordered.

## *SUPPLEMENTAL OPINION and ORDER*

On September 19, 1974, this Court filed a Memorandum Opinion and Order approving the proposed settlement of these actions. As part of that settlement the parties agreed to the appointment of an Administrator to supervise its implementation. While they agreed that the Court would appoint a person of its own choosing, they indicated a preference for a particular individual whose reputation as an experienced person in labor-management relations is undisputed.

This Court is mindful that given the context of a suit pursuant to Title VII of the Civil Rights Act of 1964 experience in labor-management relations is not without significant value to an Administrator. But this is not to say that under all circumstances an Administrator in a Title VII action must be recruited from the ranks of the labor-

management specialists. There are instances, and the Court believes this to be one of them, when other qualities may assume greater importance in meeting the commitment to the broad social policies which underpin the 1964 Act.

The Administrator appointed in these consolidated actions will be charged with the responsibility of seeing that the terms of the Settlement Agreement under Title VII of the Civil Rights Act of 1964 are diligently and conscientiously implemented. This Act was designed primarily to protect, and provide a more effective means to enforce, the civil rights of persons within the jurisdiction of the United States. It aims, inter alia, to eliminate discriminatory practices by business, labor unions, or employment agencies and thereby to encourage the growth of economic opportunities for minority individuals, thus strengthening the economic foundation essential to the full enjoyment of civil rights. When President Lyndon B. Johnson signed the 1964 Act he declared that its overriding social goal was "to promote a more abiding commitment to freedom, a more constant pursuit of justice and a deeper respect for human dignity."

In light of these broad national purposes, this Court considers it of paramount importance that the Administrator it appoints here possess a finely tuned sensitivity to the social impact of past discriminatory employment practices, and a balanced sense of dedication and commitment to the elimination of these practices.

Further, while in some cases the very nature of the industry in which the Settlement Agreement is to operate and the unusual complexity of its labor-management problems may dictate the appointment of an individual with a background in labor-management relations, such is not the case here. Here, the Court is concerned with an important but relatively small and centralized industry involving the delivery of newspapers, magazines, books, etc. The bargaining unit of the Newspaper and Mail Deliverers'

Union encompasses only about 3,000 employees most of whom are employed by the three major newspapers in the New York City metropolitan area. Given these characteristics, this Court finds that experience in labor-management relations need not be the major consideration which should guide the Court in its appointment of an Administrator.

This finding is buttressed by the fact that the Settlement Agreement here is quite detailed and specific. Were such an Agreement broad in its terms, the Administrator would be faced with the need to establish procedures, define specific objectives, and develop the methods to be employed. In such an instance, an Administrator with an extensive background in labor-management work and possibly even familiarity with the industrial unit involved would seem to be indicated. In contrast where the Settlement Agreement is highly detailed, as here, the responsibilities of the Administrator are clearly defined and consequently, his discretion is accordingly more circumscribed and the need for a particular expertise becomes correspondingly less important.

Not to be disregarded, of course, in appointing an Administrator is the assessment of the proposed Administrator by the parties. Since their respective interests clearly will be affected by the Court-appointed Settlement Agreement, there should be some assurance that there is confidence in the person to be appointed. In this case, the proposed Administrator is said to be completely satisfactory both to the private plaintiffs and to the EEOC. While it is true that the defendants have not expressed like sentiments, their reservations are centered on the proposed Administrator's lack of experience in labor-management relations. But, as the Court has already indicated, such experience while frequently desirable and even essential should not always be the prevailing consideration. Sensitivity to the broad social purposes of civil rights legislation and the disposition to fairly and adequately administer the agreement

are qualities which in this Court's view, in this case outweigh whatever lack of expertise may exist. Further, the parties herein have demonstrated a commendable spirit of cooperation which the Court confidently expects will continue during the implementation state of these proceedings. To that extent the Administrator's task will be made immeasurably less difficult.

Having carefully considered the matter in light of the principles briefly discussed above and after a careful review of a number of qualified men and women who might be available for appointment, the court has decided to appoint the person named in the Court's letter of September 11, 1974 as the Administrator.

It is so ordered.

No 73 Civ. 3058
No. 73 Civ. 4278

Filed October 25, 1974

United States District Court
Southern District of New York

JOHN R. PATTERSON, *et al.*,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, *et. al.*,

Defendants.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Plaintiff,

v.

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, *et al.*,

Defendants.

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JAMES LARKIN, DOMINICK VENTRE, FRANK CHILLEMI, GERALD KATZ, *et al.*,

INTERVENORS.

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*FINAL ORDER AND JUDGMENT*

Upon the consent of the parties, endorsed hereon by their attorneys, and upon the Settlement Agreement between the parties, dated June 27, 1974, and attached hereto as Exhibit A, and upon this Court's Memorandum Opinion and Order approving the Settlement Agreement, dated September 19, 1974, and upon this Court's Supplemental Opinion and Order, dated October 11, 1974, appointing William S. Ellis, Esq., as the Administrator, it is hereby

*ORDERED, ADJUDGED AND DECREED*:

1. The Settlement Agreement is hereby approved as a basis for settlement of these actions and the defendants in these actions, including those in default, are hereby directed to implement and perform the Settlement Agreement in accordance with its terms and with the provision of this Order and Judgment.

2. Failure to comply with this Order and Judgment, including breach of the Settlement Agreement, shall be punishable as a contempt of court.

3. A copy of the Settlement Agreement and of this Order and Judgment shall be kept available and displayed by all defendant employers in a permanent place where notices to their delivery department employees are usually posted and by defendant union in a prominent place at the union's offices.

4. This Order and Judgment and the Settlement Agreement shall be binding upon plaintiffs and all members of the class or classes they represent, and defendants and their officers, agents, servants, employees, assigns, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

5. William S. Ellis, Esq., is hereby appointed as the Administrator under the Settlement Agreement, and he

shall be compensated at an hourly rate of $65.00 plus expenses.

6. This Court's temporary restraining order of March 19, 1974, extended by consent of the parties on April 5, 1974, until the entry of this final order, is dissolved as of the effective date of this Final Order and Judgment.

7. These actions are hereby marked "settled," with prejudice and the Court hereby retains continuing jurisdiction over these actions for the purpose of the enforcement of compliance with this Order and Judgment and the Settlement Agreement and the punishment of violations thereof, and for the purpose of enabling any of the parties to apply to the court for such further orders and directions as may be necessary or appropriate.

8. This Order and Judgment shall take effect on November 11, 1974, and any application to the United States District Court for a stay thereof shall be made in writing and not later than October 29, 1974, at 10:00 O'clock a.m.

Dated: New York, New York

October 24, 1974.

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United States District Judge

No. 626

Docket No. 74-2548
Argued Jan. 9, 1975
Decided March 20, 1975

United States Court of Appeals
Second Circuit

JOHN R. PATTERSON, *et al.*,

Plaintiffs,

v.

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants-Appellees,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs,

v.

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, *et al.*,

Defendants-Appellees

DOMINICK VENTRE, *et al.*,

Intervenors.

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Before: FEINBERG, MANSFIELD and OAKES, Circuit Judges

MANSFIELD, Circuit Judge:

At issue on this appeal is the appropriateness of relief against discrimination in the employment of news deliverers. In the past we have been called upon to review relief granted in cases where discrimination has been established under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, including the use of minority percentage goals and affirmative hiring and promotion programs. *See, e.g., Rios v. Enterprise Assn. Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974); *Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm.*, 482 F.2d 1333 (2d Cir. 1973); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971). The present appeal presents several variations on the theme. Unlike previous cases the affirmative relief under attack here does not result from an order of the district court entered after a determination of the merits of the action but from a settlement agreement between the plaintiffs, who are minority persons seeking employment as news deliverers, the defendant Newspaper and Mail Deliverers of New York and Vicinity ("the Union" herein), and the Government. The settlement was reached after a four-week trial in the Southern District of New York before Lawrence W. Pierce, Judge, who approved the agreement. The person challenging the relief is not an aggrieved minority employee but a white non-union worker, James V. Larkin, who, having been permitted to intervene, seeks to set aside the agreement as unlawful on the ground that it affords benefits to minority

workers[1] not given to similarly situated white workers, regarding the advancement rate and diluting the work opportunities of these white workers.

Because he had heard a four-week trial in this case and because of the public interest involved in a Title VII action. Judge Pierce considered in a thorough opinion the merits of the plaintiffs' action and the conformity of the settlement to the goals of Title VII and the rights of the parties. *See*, 384 F.Supp. 585 (S.D.N.Y. 1974). We find no abuse of discretion in Judge Pierce's approval of the settlement and therefore affirm.

The appeal arises out of the two consolidated actions. One was brought by the Equal Employment Opportunity Commission against the Union, the New York Times ("Times" herein), the New York Daily News ("News" herein), the New York Post ("Post" herein), and about 50 other news distributors and publishers within the Union's jurisdiction. The other is a private class action on behalf of minority persons. Both complaints allege historic discrimination by the Union against minorities, and charge that the present structure of the Union's collective bargaining agreement and the manner of its administration by the Union perpetuate the effects of past discrimination in a manner that violated Title VII. The defendant publishers are alleged to have acquiesced in these practices. Appellant Larkin is one of approximately 100 white non-union "Group III" workers at the News who are given permission to intervene under F.R. Civ. P. 24(a)(2) because of their potential interest in the relief to be fashioned.

The Union is the exclusive bargaining agent for the collective bargaining unit which embraced all workers in the delivery departments of newspaper publishers and of

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[1]The term "minority" as used herein means persons who are Black, Spanish-surnamed, Oriental and American Indian. "White" or "non-minority" refers to all other persons.

publications distributors in the general vicinity of New York City, including, in addition to the city proper, all of Long Island, northeastern New Jersey counties, and north to Fairfield County, Connecticut. Of 4,200 current Union members, 995 are white.

Due to variations in the size and quantity of publications to be distributed, the needs of distributors for delivery personnel vary from day to day and from shift to shift. For that reason the work force in the industry is separated by the Union agreement into (1) those holding permanently assigned jobs ("Regular Situations") and (2) those called "shapers," who show up each day to do whatever extra work may be required on that day. The work performed by persons in both categories is unskilled. Shapers are divided into four classifications, Group I-IV. the order in which shapers are chosen for extra work on each shift is determined according to Group number and by shop seniority of members within each group.

Group I, the highest priority group, consists solely of persons who once held Regular Situations in the industry. Each employer maintains his own Group I list, which is comprised of persons who have been laid off from Regular Situations at other employers, or who have voluntarily transferred from Regular Situations or from classifications as Group I shapers at another employer. When a Regular Situation becomes available, the highest seniority person on the employer's Group I list is offered the position.

Group II is an aggregate list compiled from the entire industry and consists of all Regular Situation holders and Group I members. Taking priority after Group I is exhausted, it enable regular and Group I members to obtain extra daily work at employers other than their own.

Major employers maintain a Group III list, which consists of persons who have never held a Regular Situation in the industry. Members of Group III are given daily work

priority after Group II. To maintain Group III status, workers are required to report for a certain number of "shapes" each week. Prior to the settlement agreement under review Group III members are theoretically entitled by shop seniority to any Regular Situation that become available, if the Group I list had been exhausted. Group IV shapers are last in priority and are required to appear for a shape far less frequently than Group III shapers.

Although the Union represents all delivery workers, membership is limited to Regular Situation holders and Group I members. Historically the Union has excluded minorities and has limited its membership to the first born son of a member. Aside from the chilling effect which restriction of Union membership to whites might in itself have upon minority persons seeking delivery work, there is evidence that minorities were also discouraged from gaining entrance to Group III lists, even though Group III shapers are not members of the Union. Of 2,855 persons now actively seeking work in the industry (which includes 2,460 Regular Situation holders, 123 Group I shapers, and 273 Group III shapers only 70, or 2.45%, are minority persons.

While the current Group Situation which was adopted in 1952 appears on its face to open Union membership to anyone in the labor force, Union membership, because of lax administration of the contract provisions, has largely remained attainable only by the family and friends of a Union member. Due to artificial inflation of the Group I lists, no person has in practice made the theoretically possible jump from Group III to a Regular Situation since 1963. The evidence suggests that this expansion of the Group I lists has been accomplished primarily by use of voluntary transfers of Group I or Regular Situation holders from the lists of smaller distributors to the Group I lists of more desirable, larger employers, and ultimately to Regular Situations there. Other devices include fictitious lay-offs, enabling the Union member to transfer to Group I of the different employer, and outright false assertion of Group I

status by persons who have obtained Union membership cards, the validity of which have not been challenged by employers.

On the basis of this evidence, which was largely uncontroverted, Judge Pierce, in approving the settlement, had no difficulty concluding that the Union's practice amounted to a violation of Title VII, since they served to "'lock-in' minorities at the non-union level of entry in the industry, and thereby to perpetuate the impact of past discrimination . . . ," conclusions that appear fully justified by the record and are not challenged here. *See, Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Rios v. Enterprise Assn. Steamfitters, Local 638, supra*; *United States v. Wood, Wire & Lathers, Intl. Union, Local No. 46*, 471 F.2d 406 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973); *United States v. Bethlehem Steel Corp., supra*.

The settlement agreement reached by the parties provides that the Union shall be permanently enjoined from discriminatory practices in violation of Title VII. It establishes an administrator to insure compliance with the terms of the agreement, and provides for the elimination of past abuses, primarily by abolishing voluntary transfer by Union members. It establishes a minority hiring goal of 25%, specifies a procedure for attaining that goal, and provides for back pay to minority workers. Most of these provisions are not challenged by Larkin.

The 25% goal is to be reached throughout most of the industry by requiring that all incumbent minority persons on the Group III list of each employer as of the date of entry of the order are to be moved immediately to group I. All new persons hired in the industry and classified in Group III will be employed according to a ratio of three (3)

minority[2] persons to two (2) non-minority persons. As each Regular Situation is filled by a Group I member, one Group III member shall be moved to Group I and offered Union membership. This is to be done on an alternating one-for-one basis between minority and non-minority workers. Each two vacancies in Group I will thus be filled by the minority worker in Group III having highest seniority and the highest seniority non-minority worker. The agreement also modifies these provisions insofar as they apply to the smaller employers and to the Daily News, taking into account special conditions affecting each. At the News, an equal number of non-minority persons from Group III will follow those minority workers who move into the Group I list on the date of the order, also, for a certain time, one minority and one non-minority person will replace each person on the Group I list promoted to the Regular Situation.

Larkin's objection to the settlement is premised on the observation that Group III white workers have not benefited from the Union discrimination which is the object of this lawsuit. On the contrary, as Judge Pierce recognized, they also have suffered from Union policies which barred Group III workers from access to Group I and permanent jobs. Upon this premise. Larkin first broadly asserts that because the Group III whites were also discriminated against, they are entitled to the same relief as the minority workers. More specifically, he objects to those aspects of the affirmative action plan which, he asserts, allow minorities to "leap-frog" non-minorities with greater seniority. He also

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[2]Intervenor in addition, suggests procedural infirmities in the court's approval of a plan to which he objected. It is difficult to think of a way in which appellant was denied procedural rights however, since Judge Pierce afforded him a hearing and thoroughly considered his objections.

attacks the 25% goal.[3]

*DISCUSSION*

The scope of our review of a district court's approval of a settlement agreement is limited. "[T]he appellate court should intervene only on a clear showing that the trial judge was guilty of an abuse of discretion," *State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). While the public objective embodied in Title VII warrant a careful review of the provisions of the settlement in light of those policies, *see*, *Rios v. Enterprise Assn. Steamfitters, Local 638*, 501 F.2d 622, 628 n.4 (2d Cir. 1974), the clear policy in favor of encouraging settlements must also be taken into account, *see Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960), particularly in an area where voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals. Nor should we substitute our ideas of fairness for those of the district judge in the absence of evidence that he acted arbitrarily or failed to satisfy himself that the settlement agreement was equitable to all persons concerned and in the public interest, *cf. United States v. Wood, Wire & Metal Lathers Intl. Union, Local No. 46*, 471 F.2d 408, 416 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973), especially in a case like the present one where the settlement was approved and two hearings with respect to the fairness and adequacy of the proposed agreement. Furthermore, unlike appeals from decrees of the district court entered after trial on the basis of findings and conclusions where we may modify the terms

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[3]Intervenor, in addition, suggests procedural infirmities on the Court's approval of a plan to which he objected. It is difficult to think of a way in which appellant was denied procedural rights however, since Judge Pierce afforded him a hearing, and thoroughly considered his objections.

of the decree, *see, e.g., United States v. Bethlehem Steel Corp., supra*, we are powerless to rewrite the provisions of the settlement agreement. Our only alternative, if we concluded that Judge Pierce had abused his discretion, would be to set aside his approval of the settlement and remand the case for completion of the trial. *United States v. Automobile Manufacturers Assn.*, 307 F. Supp. 617 (C.D. Calif.), *affd, per curiam sub nom., City of New York v. United States*, 397 U.S. 246, 90 S.Ct. 1105, 25 L.Ed.2d 280 (1970).

Although Larkin objects to the use of a 25% goal and to Judge Pierce's conclusion that the minority make-up of the relevant part of the labor force is 30%, he does not suggest any alternative or more reliable figures as to the labor force, he merely calls the court's figures "contrived." In contrast to his failure to provide any evidentiary support for his objections, the record reveals that, in concluding that the 25% goal was appropriate, Judge Pierce relied on population figures in the Department of Commerce's publications, *General Population Characteristics -- 1970 Census of Population and General Social and Economic Characteristics, 1970 Census of Population* and took into account the relevant geographic area and demographic characteristics of those making up the news delivery work force. Thus, his conclusion, laid down in *Rios v. Enterprise Assn. Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974), was adequately based.[4]

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[4]Intervenor also suggests that his rights under 42 U.S.C. § 2000e-2(j) have been violated. The section provides in pertinent part.

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of race color, religion, sex, or

(continued...)

Larkin's argument that he is entitled to the same benefits as the minority workers must also be rejected. This case arises under a statute which by its terms is limited to protection against employment discrimination based on an individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Larkin does not allege discrimination against him based on any of these factors. He argued only that the industry's part practices discriminated against all Group III members, minority and non-minority, and that while the settlement agreement remedies the discrimination against minority persons it fails to afford any relief for the harm caused to non-minority persons. Worse still, he asserts, the relief to minority persons is at the expense of the white Group III workers.

At first glance this argument has much appeal. As the district court recognized, Group III workers were the victims of some practices that were harmful to all Group III

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[4](...continued)

> national origin of such individual or group o account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization admitted to membership or classified by any labor organization, or admitted to, or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area."

It is well settled in this Circuit that this section does not preclude the use of racial hiring quotas to remedy the effects of past discrimination. *Rios v. Enterprise Assn. Steamfitters, Local 638, supra*, 501 F.2d at 630-31; *Vulcan Society v. Civil Serv. Comm.*, 490 F.2d 367 (2d Cir. 1973); *United States v. Wood, Wire & Metal Lathers, supra*.

members, regardless of race. Minority members, on the other hand, were the targets of racial discrimination on the part of the virtually all-white Union. In this Title VII action we are limited to consideration of the fairness of relief directed only to the latter. The objective of Title VII is to "attack the scourge of racial discrimination" which has "caused manifold economic injuries, including drastically higher rates of unemployment and privation among racial minority groups." *United States v. Wood, Wire & Metal Lathers Intl. Union*, 341 F. Supp. 694, 699 (S.D.N.Y. 1972), *affd.* 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973). It creates no rights or benefits in favor of non-minority persons or groups. Any past denial of promotion rights to Larkin is clearly not remediable under Title VII. Indeed, Group III white workers have unsuccessfully sought relief for themselves under other statutes. It is thus apparent that Larkin has no right to any of the affirmative relief afforded to the minority groups, including the back pay provisions.[5] Our review, therefore, must be limited to the question of whether the settlement agreement, in remedying minority discrimination, treats the intervenors fairly. *See State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 401 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971).

The affirmative-action provisions of the agreement under review affect Group III workers in the industry, and particularly Daily News workers, in two ways. First, the provisions for immediate transfer of incumbent minorities at

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[5]*United States v. Roadway Express, Inc.*, 457 F.2d 654 (6th Cir. 1972) relied on by the intervenor does not suggest otherwise. There the court was faced with a settlement agreement in which the union had agreed to give some benefits to white as well as minority non-union workers. When white union members objected the court refused to invalidate the agreement. The case does not require that a settlement give equivalent benefits to minority and non-minority workers.

major employers to Group I and for the filing of Group I openings by alternately promoting one minority worker and then one non-minority worker from Group III to Group I mean that a white Group III worker will advance to Group I less rapidly than would be possible if straight shop seniority were the basis of promotion. Indeed, a time will shortly come when minority persons not employed in the industry at all on the date when the agreement went into effect may achieve Group I status before many Group III whites with seniority. Although this feature of the agreement is not as beneficial to Larkin as would be promotion on the basis of straight non-minority regardless of race, the agreement nevertheless benefits Larkin. It presents him with an opportunity he never had before: the chance to move up to Group I, and eventually to a Regular Situation. Before, there was in effect no seniority system with respect to promotion into Group I. Thus any plan for advancement of Group III members to Group I could only be beneficial to Larkin. Approval of the plan can hardly be labelled as abuse of discretion because it does not advance Larkin as rapidly as minority persons with less seniority. A reasonable preference in favor of minority persons in order to remedy past discrimination injustices is permissible. *See Rios v. Enterprise Assn. Steamfitters*, 501 F.2d 622 (2d Cir. 1974).

Second, the agreement affects daily work priorities. Its provision that all present incumbent Group III minority workers shall move at once into Group I immediately drops Group III whites in daily priority by whatever number of minority workers of lesser seniority are added to the higher priority Group I. Furthermore, the one-to-one ratio for promotion thereafter of workers from Group III into Group I as openings in Group I become available means that an average non-minority Group III worker will not advance as quickly up the daily priority ladder within Group III as he would under straight raceless seniority. This results from the fact that, whenever two openings in Group I become available, one will be filled by a white worker senior to him

and one by a minority worker of lesser seniority. Thus he moves up only one step for every two Group I openings.

The situation is even less favorable at the Daily News where for an initial period as each Group I opening (rather than two openings) becomes available, the employer will add one minority and one non-minority employee to Group I. The effect of the expansion of Group I to take in minority members of lesser seniority is likely to slow down the rate of advancement of non-minority persons within Group III more than under a one-for-one arrangement limited to an equal number of vacancies in Group I. Of course, in all cases once a Group III white employee reached Group I, he will move up in daily work priority (and priority for a Regular Situation) on the same basis as existed before the agreement.

Appellant characterizes these effects as "leap-frogging" or "bumping" of incumbent white workers, *see United States v. Bethlehem Steel Corporation*, *supra*, 446 F.2d at 659, and argues that we have rejected other affirmative action programs having such an effect. It is true that we have suggested that court ordered relief involving minority employment goals be confined to entry level positions. Thus in *Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm.*, 482 F.2d 1333 (2d Cir. 1973), we upheld the imposition of racial hiring quotas at the patrolman's level, the entry level of the police force, but rejected the use of such quotas for promotion to higher ranks. In *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971), we simply noted that minority transferees under the court's order would be transferred into job vacancies created in the normal course of business and that no incumbent employee would be "bumped" out of his job. *Id.* at 664. In neither case did we specifically pass on the propriety or fairness of "bumping" an incumbent.

These cases do not support rejection of the agreement that has been reached in this case. The *Bridgeport Guardians* decision was based upon the failure to establish

any discrimination within the promotional system, the proof being limited to discrimination at the point of entry into the police force, *i.e.*, in qualifying for the rank of patrolman. *See* 482 F.2d at 1333-41. In the present case, on the other hand, there has been racial discrimination throughout the industry. Furthermore, even assuming the desirability of confining use of quotas to entry level positions, the effective point of entry into employment in the industry has been at Group I, not Group III. Judge Pierce found that "Group III workers do not have full-time employment, nor do many of them have great expectations or intentions of working full-time while they shape from the Group III list." It is true, as appellant points out, that both Group I and Group III workers must shape regularly and neither has assurance of regular work. But the fact remains that traditionally a worker who reached Group I was on the road to a Regular Situation, whereas one who was in Group III would not progress above that level.

Even assuming that "bumping" of incumbents from their present jobs is inadvisable in an affirmative hiring scheme, it is inaccurate to characterize Group III workers as having been "bumped." They have retained their position: they have not been delisted in favor of minorities. Moreover, we are not dealing with workers who have been steadily employed under conditions where seniority is synonymous with an assured job but with a fluctuating group of shapers competing for a limited amount of work that varies widely from day to day. Although some may have declined somewhat in their daily work priority, as Judge Pierce pointed out, the actual effect of this decline is difficult to gauge since the availability of work at a given shape depends on the stability of the total number of jobs available from shift to shift and whether or not the new person chooses to shape the same shift. In other words, assessing a shaper's expectation is a highly speculative exercise." In addition, the number of minority workers promoted to Group I on the date the agreement became effective, which

solely accounts for any decline in daily work priority, is quite small. Only 13 of 178 Group III members at the News were minority persons, 6 of 34 at the Times.

The impact of any dilution of daily work opportunities resulting from the settlement agreement is, furthermore, softened by the fact that all current Group III members will be elevated to Group I within a fairly short time. The News estimates that within a month after implementation of the plan all non-minority workers above 47 on the Group III list will be elevated to Group I and that thereafter about 27 non-minority persons per year will be promoted from Group III to Group I. This suggests that any decline in daily work priority attributable to the promotion of presently incumbent minority workers to Group I will be offset for most workers by a rise in priority within Group III resulting from the expeditious upward movement of Group III whites, also made possible by the program. Finally, should some Group III workers have difficulty finding work, the agreement empowers the administrator to assure that any existing work opportunities in the industry be made available to those unable to get at least 45 shifts of work in a calendar quarter.

Aside from the foregoing, there was evidence from which it could be inferred that, if there had been no racial discrimination in the industry, more minority persons would have been able to enter Group III and to gain seniority over many whites within Group III. Thus, although Larkin has been the victim of a system which excluded Group III members, minority and white, from promotion to Group I, he may well have been the modest beneficiary, vis-a-vis the minority work force, of a policy that discouraged minority persons from entering Group III. To the extent that the settlement may cause a temporary decline in Group III white worker's rate of promotion and daily work priority, it merely compensates for past discrimination by allowing a reasonable number of minority persons to be promoted to the "rightful place" on the seniority ladder, which they would have

occupied but for industry-wide racial discrimination.

In any event it must be recognized that rights of the kind Group III workers here assert "are not indefeasibly vested rights but mere expectations derived from a bargaining agreement and subject to modification." *United States v. Bethlehem Steel Corp., supra*, 446 F.2d at 663. Here appellant has applauded those modifications of the collective bargaining agreement that are favorable to him, such as the removal of the provision limiting Group I to former Regular Situation holders. Under the peculiar circumstances that have governed employment in this industry it does not strike us as unfair to impose certain modifications on the manner in which promotions or qualifications for daily work are determined. Job seniority need not be the only standard for determining promotions. Orders requiring that job vacancies be filled by means other than normal routes o internal promotion have been upheld as necessary to remedy past discrimination. *Gates v. Georgia-Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974); *cf. Allen v. City of Mobile*, 331 F. Supp. 1134, 1142-43 (S.D. Ala. 1971), *aff'd. per curiam*, 466 F.2d 122 (5th Cir. 1973), *cert. denied*, 412 U.S. 909, 93 S.Ct. 2292, 36 L.Ed.2d 975 (1973) (§ 1983 actions), and indeed, affirmative relief displacing white with greater seniority has been granted, *see United States Sheet Metal Workers International Assn., Local 36*, 416 F.2d 123, 133-34 (8th Cir. 1969).

The provisions of the settlement agreement affecting Larkin thus cannot be characterized as illegal or unfair. Whatever disadvantages he may temporarily suffer in terms of daily work priority are offset by the substantial improvement in his long range prospects arising from the opportunity that has been created for the first time, for him to reach Group I and, eventually, Regular Situation status. Judge Pierce therefore did not abuse his discretion in finding the settlement agreement to be fair to Larkin. The order is affirmed.

FEINBERG, Circuit Judge (concurring)

I concur in the result.

This case involves the difficult issue whether a hiring quota based upon race can be legally imposed under the Civil Rights Act of 1964 or the United States Constitution. In the past few years, this court has twice held that such quotas may be utilized to correct past discriminatory practices in public employment. *Vulcan Society v. Civil Service Comm'n.*, 490 F.2d 387 (2d Cir. 1973) (firemen); *Bridgeport Guardians,Inc. v. Civil Service Comm'n.*, 482 F.2d 1333 (2d Cir. 1973), petition for *cert.* filed, 43 U.S.L.W. 3282 (U.S. Nov. 11, 1974) (policemen). We have also permitted such remedial quotas in two cases in which the employment was in the private sector of the economy. *Rios v. Enterprise Ass'n Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974); *United States v. Wood, Wire & Metal Lathers, Local 46.*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L...Ed.2d 398 (1973).

Nevertheless, I believe a strong note of caution is called for and should be stated. In *Rios*, Judge Hays wrote a powerful dissent, arguing that section 703(j) of the Civil Rights Act, 42 U.S.C. § 2000e-2(j), bars the use of court-ordered racial hiring quotas.[1] He distinguished our

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[1]Section 703(j) provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified by any labor organization, or admitted to, or employed in, any

(continued...)

decisions in *Vulcan Society* and *Bridgeport Guardians* on various grounds, the most persuasive of which was that "there was no other means of affording relief that did not interfere with essential public services" provided by firemen and policemen. 501 F.2d at 638. In both cases, hiring had to continue while new, non-discriminatory employment lists were drawn up. Judge Hays also distinguished *Wood, Wire & Metal Lathers*, because the union there, in accepting a settlement, waived the benefit of section 703(j). A close analysis of the cases in our circuit thus suggests that *Rios* is the only decision squarely holding that a court may impose a racial quota in a private employment case in the absence of a settlement.

Emphasizing the status of the authority in this circuit on the issue is worthwhile because, as we have earlier pointed out, quotas should be approached "somewhat gingerly." *Bridgeport Guardians. supra*, 482 F.2d at 1340. the reason for this is clear: A racial quota is inherently obnoxious, no matter what the beneficent purpose. Such a quota is demeaning and divisive. At best it is a lesser evil. It is not to be encouraged.

However, this case is not an appropriate one for reexamination of the subject. The past discrimination against minority workers here was made quite clear after a four-week trial to the court. Minorities are conspicuously absent from the ranks of Group I and Regular Situation holders even though there are no special skills required to fill the jobs involved. The intervenor asks us to upset a settlement agreement that provides benefits for whites as

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[1](...continued)

apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

well as for minorities. The quota the principal parties have agreed upon is intended to be of short duration. 384 F. Supp. at 590-91. And finally, the intervenor does not direct his main attack against the idea of a hiring quota: he objects to its size and the effect on him and others already in the industry in Group III status.

Under all of these circumstances, I concur in the result.

No. 73- Civ. 3058
No. 73 Civ. 4278

United States District Court
Southern District Of New York
June 10, 1980

JOHN R. PATTERSON, *et al.*,

Plaintiffs,

v.

NEWSPAPER and MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

Plaintiff,

v.

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK and VICINITY, *et al.*,

Defendants,
JAMES LARKIN, *et al.*,

Intervenors.

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PIERCE: D.J.:

Various defendants in these actions bring this application for an order modifying the settlement agreement which was entered into by the parties on June 27, 1974 and subsequently approved by this Court on October 25, 1974. The defendant/movants seek now to eliminate the positions of Administrator of the settlement agreement. Under the proposed modification of the settlement agreement, the responsibilities of the Administrator would be performed by the Equal Employment Opportunity Commission and by the Adjustment Board of Hiring Practices, as established under the collective bargaining agreement entered into by the defendant Newspaper and Mail Deliverers' Union and various defendant employers. Before addressing the merits of this application the history of these actions will be reviewed briefly.

*History of Actions*

These actions were commenced in 1973. Plaintiffs alleged that defendants had engaged in employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* At the conclusion of a four-week trial on the merits, the parties agreed to a settlement of the claims asserted. However, the terms of the settlement agreement were opposed by certain intervenors.

By Memorandum Opinion and Order dated September 19, 1974, this Court approved the settlement agreement. *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity*, [8 EPD ¶9736], 384 F. Supp. 585 (S.D.N.Y. 1974). It was noted in that decision that the nepotistic membership policy of the defendant union prior to 1952 had resulted in discrimination against minority applicants, since few, if any, members of the union were from minority groups. *Id.* at 589. Indeed, as stated by the Court of Appeals for the Second Circuit on review of the aforesaid decision, "[h]istorically the Union has excluded

minorities and has limited its membership to the first born son of a member." *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity*, [9 EPD § 10,033], 514 F.2d 767, 770 (2d Cir. 1975). At the time this Court approved the settlement agreement, less than 1% of the members of the union were from minority groups. *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity, supra*, 384 F. Supp. 588.

The settlement agreement entered into by the parties set forth the goal of increasing minority employment in the industry to 25%. To help achieve this goal, the position of Administration of the settlement agreement was established under the express terms of the settlement agreement. Under paragraph 4 of the agreement, the Administrator was "empowered to take all actions . . . as he deems necessary to implement the provisions [of the agreement] and to ensure performance of the Order [approving the settlement]." The terms of paragraph 4 also provided that the Administrator was responsible for reviewing and determining all "complaints that any individual in the bargaining units in the industry represented by NMDU has been allegedly denied equal employment opportunities on the basis of race, color or national origin and [for deciding any questions of interpretation and claims of violation of the Order [approving the settlement] by any party or by any such individual employee or applicant for employment.

Paragraph 6 of the settlement agreement provides that the Administrator shall be designated by the Court and shall remain in that position for an initial period of five years at the conclusion of which he or his successor shall remain in office for such time as this Court directs. Pursuant to that provision, William S. Ellis, Esq. was appointed by the Court as Administrator of the settlement agreement in November, 1974.

In this Court's view, since the date of his appointment, the Administrator has performed his duties

with dedication and has ably and fairly fulfilled his obligations. In his report to the Court dated October 19, 1979, the Administrator indicated that as of April 31, 1979 the percentage of minority employment was 12.16%, slightly less than half the goal set forth in the settlement agreement. That report also lists fifteen pending matters which were before the Administrator as of the date of the report. By letters to the Court dated January 16, 1980, March 10, 1980, and June 3, 1980 the list of pending matters had been updated. As of June 3, 1989, eleven matters were pending.

On November 11, 1979, the initial appointment of the Administrator terminated pursuant to paragraph 6 of the settlement agreement as discussed above. See Order dated October 29, 1979. Thereafter, Ellis was appointed as Interim Administrator pending resolution of the present motion for modification of the settlement agreement. See Order dated November 13, 1979.

*Motion for Further Relief and*

*Modification of Agreement*

The defendant/movants seek to eliminate the position of the Administrator and to substitute the EEOC and the Adjustment Board on Hiring Practices as the principal agencies responsible for implementation of the settlement agreement. The Adjustment Board was established by the collective bargaining agreement between the union and two defendant employers, the New York Times, Co. and the New York News, Inc. It is composed of four members of which two members are designated by the union and two members are designated by the Publishers /Association of New York City. The defendant/movants are members of the Publishers Association. Under the collective bargaining agreement, the Adjustment Board is responsible for hearing and determining employment disputes.

Under the proposed plan submitted by the defendant/movants, all complaints would be initially filed with the EEOC. The EEOC would then refer the dispute to the parties for 45 days for voluntary settlement purposes. If no resolution is reached within that time the EEOC should refer the complaint to the Adjustment Board for final and binding resolution. The Board's decision would then be submitted to the EEOC. Any party could then request a plenary review of the Board's decision by this Court.

The principal arguments asserted by the defendant/movants in support of their application are that: (1) the expense of maintaining the positions of the Administrator is high; (2) the EEOC and the Adjustment Board can fulfill the functions of the Administrator; (3) the industry is declining; (4) significant progress has been made toward the achievement of the 25% minority employment goal.

Both the EEOC and the Interim Administrator have responded to the proposed plan in compliance with the request of this Court. The EEOC has indicated that it will not function as a substitute for the Administrator. It is prepared, however, to assume a role in three areas formerly filled by the Administrator. It will initially process complaints through its "Rapid Charge Processing System." It will also forward all claims to the employers and the union for voluntary resolution or to the Adjustment Board for arbitration. The EEOC will also monitor the periodic reports from the defendants which have been monitored in the past by the Administrator. See Settlement Agreement ¶ 7 at p. 5. The statement by the EEOC regarding the extent to which it will be able to participate in the implementation of the settlement agreement is consistent with the plan proposed by the defendant/movants.

The Interim Administrator indicates that he favors a greater participation of the EEOC in the implementation process than that proposed by the defendant/movants. He

has proposed that the EEOC not only initially process claims but also that it participate in the initial attempts to resolve disputes, hold adjudicative hearings, provide legal and advocacy services to complainants, and be available to answer questions of current and prospective employees regarding their rights under the settlement agreement. He also states that the role of the administrator as an overall supervisor of the industry's progress toward the 25% minority employment goal should be preserved.

*Discussion*

As indicated above, less than 1% of the membership of the defendant union and less than 2% of the employment in this industry consisted of persons of minority background in 1974. Although significant progress has been made toward the achievement of the settlement goal, it appears that full achievement thereof is not imminent. Less than one-half of the 25% minority employment goal has been achieved in the five-year period from 1974 through 1979, according to the Administrator's last report to the Court. The progress of the industry toward achievement of this goal has not yet reached the point, at which the Court should dispense with the requirement of supervision by a neutral party as set forth in the voluntary settlement agreement. Some mechanism must be provided which will ensure the continued advancement toward the settlement goal.

In this regard, the proposed replacement of the Administrator with the EEOC and the Adjustment Board is not an acceptable alternative to maintaining the position of the Administrator. Under the proposed plan the central function of resolving claims of racial employment discrimination is to be referred to the Adjustment Board which consists of person representing the very defendants who have been charged in these actions with having engaged in practices which resulted in the exclusion of minority employees in this industry. Indeed, some of the claims of employment discrimination which, under this proposal the

Adjustment Board would be called upon to resolve, might well involve defendants who have representatives on the Board.

The Court is mindful of the burden borne by defendants with respect to the costs incurred under the present structure. It is not inappropriate that such costs fall upon those whose conduct or failures have caused the legal and factual situation complained about in the first place.

Accordingly, the application of the defendant/movants is denied. William S. Ellis, Esq. is hereby appointed as Administrator of the settlement agreement, pursuant to paragraph 6 thereof, for a period of five years commencing with the date of the entry of this Memorandum and Order. Since the EEOC and the Administrator agree that the EEOC should participate in the implementation of the settlement agreement, the Court requests that the EEOC and the Administrator submit within 30 days a joint plan regarding the roles of the EEOC and the Administrator.

A final matter which requires resolution is the compensation of the Administrator. Pursuant to the Final Order and Judgment dated October 24, 1974, the Administrator has received compensation for the past five years at the rate of $65.00 Per hour. That rate of compensation, however, is not now consistent with the current rate received by the attorneys in this region. The Court notes that the law firm of which the Administrator is a member presently charges between $85.00 and $150.00 per hour. See Affidavit of William S. Ellis dated May 6, 1980. Under paragraph 5 of the settlement agreement, the Court is authorized to fix the hourly compensation of the Administrator in its discretion. Therefore, the Court hereby directs that William S. Ellis, Esq. shall receive compensation for his future services as Administrator of the settlement fund, commencing with the date of the entry of this Memorandum and Order, at the rate of $85.00 per hour to be paid in accordance with the Order of this Court dated

June 11, 1975.

So Ordered.

No. 73-Civ. 3058 (WCC)
No. 73-Civ. 4278
Filed December 15, 1986

United States District Court
Southern District of New York

JOHN R. PATTERSON, *et seq.*,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Plaintiff,

v.

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, *et al.*,

Defendants.

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CONNER, D.J.:

A class of private plaintiffs and the Equal Employment Opportunity Commission ("EEOC") brought two civil rights action in 1973 against the Newspaper and Mail Deliverers' Union of New York and vicinity ("the Union") and more than fifty publishers and news distributors within the Union's jurisdiction. Both suits charged that the Union, with the acquiescence of the publishers and distributors, had historically discriminated against blacks and other minorities, and that the structure of the collective bargaining agreement, combined with nepotism and cronyism, had perpetuated the effects of the past discrimination in violation of Title VII of the Civil Rights of 1964. Each lawsuit sought an affirmative action program designed to achieve the minorities the status they would have had in the newspaper delivery industry but for the alleged discrimination practices.

On September 19, 1974, then-District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties. *Patterson v. Newspaper & Mail Delivers' Union*, [8 EPD ¶ 9736), 384 F. Supp. 585 (S.D.N.Y. 1974), *aff'd* [9 EPD ¶ 10,033], 514 F.2d 767 (2d Cir. 1976), *cert. denied* [12 EPD ¶ 11,008], 427 U.S. 911 (1976). The settlement agreement provided that all defendants would be "permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating against any individual or class of individuals on the basis of race, color or national origin." Settlement Agreement ¶¶ 1,2. The Union was required to "receive and process applications for membership, admit members, handle grievances and otherwise administer all of the affairs of the NMDU so as to ensure that no individual represented by it is excluded from equal advancement, on the basis of race, color or national origin." *Id.* ¶ 1. The employers agreed not to "fail or refuse to hire for employment any [individual in their bargaining unit represented by the union], [or to] take any other action which would deprive any such individual of

equal employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color or national origin." *Id.* ¶ 2.

In addition, the settlement agreement included an affirmative action program that set a minimum goal of 25% minority employment in Regular Situation and group positions in the industry by June 1, 1979. *Id.* ¶ 7. In an order dated June 10, 1980, Judge Pierce extended the consent decree for another five-year period because the goal of 25% minority employment had not been reached. Now the Administrator and defendants report that the goal has been reached.

Consequently, the Union and most of the defendant employers have moved to vacate the consent decree in its entirety, or in the alternative, to modify the decree to eliminate the affirmative action provision. The EEOC has opposed a complete termination of the decree, but does not object to a modification of the affirmative action provisions for those companies that have 25% minority employment. The private plaintiffs, however, have vigorously objected to defendants' suggestion that the terms of the consent decree should be relaxed and have cross-moved for further relief under the consent decree. Needless to say, defendants have indicated that they oppose these proposals.

On October 21, 1986, I issued an opinion and order deferring a decision on motions of the parties pending a hearing scheduled for the matter on Monday, February 23, 1987 at 10:00 A.M. in Courtroom 618. Since that time numerous disputes have arisen concerning the scope of discovery on the issues raised by the parties' motions. I issue this opinion to provide guidance to the parties concerning the permissible scope of discovery.

In my opinion of October 21, 1986 I ordered an evidentiary hearing to decide whether the consent decree

should be terminated or modified. The consent decree represents a settlement between the parties of this case which was approved by Judge Pierce as long ago as September 19, 1974. This Court is not a party to this agreement and must respect the terms reached by those who are parties to the settlement. Accordingly, I must proceed cautiously before upsetting the settlement agreement in any way.

At the February hearing, the only issue before the Court will be whether the consent decree should be terminated with respect to some or all of the defendants.[1] The hearing will not be for the purposes plaintiff has suggested: *i.e.*, to determine whether defendants have violated Title VII of the Civil Rights Act of 1964 or the consent decree. If plaintiffs believe that defendants have violated the consent decree, they should apply to the Administrator for relief pursuant to the decree.[2] If they believe that the decree was insufficient to end discrimination in the industry, they must bring a new action for the relief they seek. This Court cannot grant such relief by modifying the consent decree.

As I said in my October 21, 1986 opinion, the private plaintiffs are entitled to discovery on the issues to be determined at the hearing, to facilitate a complete and orderly presentation of evidence at the hearing. Any discovery before the February hearing must, however, be limited to the issue before the Court on that date. Plaintiffs'

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[1]It is therefore unnecessary for the Court to consider plaintiffs' motion to bifurcate the issues at the February hearing.

[2]Under the terms of the settlement, the Court's role is limited to review of decisions by the Administrator where timely objection is made in writing. The express terms of the decree provide that alleged violations of the decree are to be brought before the Administrator. Any questions of discovery related to such claims should also be brought before the Administrator in the context of those proceedings.

First Interrogatories are therefore overbroad and defendants are not required to answer them. Since the appropriate scope of discovery is much less broad than plaintiffs first proposed, it is not necessary at this time to order discovery to be expedited.

So Ordered.

Nos. Civ. 3058 (WCC), 73 Civ. 4278 (WCC)

United States District Court
Southern District of New York

March 15, 1988

JOHN E. PATTERSON, *et al.*,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff.

v.

NEWSPAPER AND MAIL DELIVERERS UNION OF NEW YORK AND VICINITY, *et al.*,

Defendants.

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CONNER, D.J.

A class of private plaintiffs and the Equal Employment Opportunity Commission ("EEOC") brought two civil rights actions in 1973 against the Newspaper and

Mail Deliverer's Union of New York and vicinity and more than fifty publishers and news distributors within the Union's jurisdiction. Both suits charged that the Union, with the acquiescence of the publishers and distributors, had historically discriminated against minorities, and that the structure of the collective bargaining agreement, combined with nepotism and cronyism, had perpetuated the effects of the past discrimination in violation of Title VII of the Civil Rights Act of 1964. Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in the newspaper delivery industry but for the alleged discriminatory practices.

On September 19, 1974 then-District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties and incorporating it in a consent decree. *Patterson v. Newspaper & Mail Deliverer's Union*, 384 F. Supp. 585 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976). The settlement agreement established an Administrator, appointed by the Court, to implement the provisions of the consent decree and to supervise its performance. The Administrator hears all claims concerning violations of the consent decree. Appeals from his decisions are heard in this Court.

The action presently before the Court is an appeal from the Administrator's ruling of July 22, 1987. For the reasons set forth below, his ruling is affirmed.

## I. Background

The settlement agreement enjoins all defendants from discriminating against any individual or class of individuals on the basis of race, color or national origin. Settlement Agreement ¶¶ 1, 2. By the terms of the agreement, the Union is required to "receive and process applications for membership, admit members, handle grievances and otherwise administer all of [its] affairs . . . so as to ensure

that no individual represented by it is excluded from equal work opportunities including overtime and advancement, on the basis of race, color or national origin." *Id.* ¶ 1. The employers agreed not to deny employment to individuals in the bargaining units represented by the Union, or to deprive such individuals of equal employment opportunities, or otherwise adversely affect their status as employees or applicants for employment because of their race, color or national origin. *Id.* ¶2.

The settlement agreement also establishes an affirmative action program which modifies the collective bargaining agreement for the industry. Prior to the settlement agreement, the collective bargaining agreement required each employer to maintain a work force of regular situation holders for its minimum needs. To accommodate fluctuations in the circulation of the various publications produced by the employers, the contract permitted employers to supplement their work force with daily shapers.

The shapers at the major employers were categorized into groups with descending daily hiring priorities. The group I list was restricted to persons who at one time had held a regular situation in the industry. They had first priority at every shift, in order of their shop seniority. After group I was exhausted at any given shift, the next hiring priority went to group II members. Group II consisted of all persons in group I and all persons holding regular situations in the industry. Once all of the group II members who had appeared for work were employed, the remaining jobs, if any, went to group III members, in order of their shop tenure.

In addition to structuring the daily hiring priorities, the group system also was supposed to represent the priority list for filling regular situations as they became vacant. As a regular situation opened, the person with the greatest tenure on the group III list was entitled to move up the group system.

Judge Pierce found that the group system promoted nepotism and cronyism as the determining factors of advancement within the industry. This had a discriminatory impact on minorities, who were effectively barred from advancing up the group system.

The affirmative action program incorporated in the settlement agreement was designed to correct this discrimination by modifying the group system. The program eliminates the contract provision that the restricted group I to former regular situation holders, and provides for the orderly flow of group III shapers into group I, and from there into regular situations. The agreement mandates that for each non-minority group III member elevated to group I, a minority group III member must also be elevated. Settlement Agreement, ¶11. In addition, for every two non-minority persons added to the group III list, three minority persons must be added. *Id.* at ¶15. Regular situations are filled as they become available by advancing the most senior group I member, without regard to race, color or national origin. *Id.* at ¶ 10(c). The goal of the affirmative action program is 25% minority employment in the bargaining unit throughout the industry. *Id.* at ¶ 7.

The Union wrote to the administrator on September 26, 1986, and requested that he exempt the group III list at New York News, Inc. ("News") from the required 3:2 ratio. The Union asserted that the News was no longer bound by the settlement agreement because minority representation on the group III list was substantially above 25%. On November 21, 1986, the administrator responded by letter that he did not object to the Union's proposal. The Union and the News, however, did not wait for the administrator's response, and on November 4, 1986, the Union and the News advanced ten non-minorities and four minorities to the News's group III list.

Shortly thereafter, the Union and most of the defendant employers moved to vacate the consent decree in

its entirety, or in the alternative, to modify the decree to eliminate the affirmative action provisions, based upon the attainment of the 25% goal. On February 23, 1987, the Court held a hearing on the question of whether the 25% goal had been achieved. Although some employers were able to show that minority employment had reached or exceeded 25% among their employees, it did not appear that minority employment in the bargaining unit had reached 25% throughout the industry. The Court noted that paragraph seven called for "'25% minority employment *in the industry*.'" Hearing Transcript at 124-25 (quoting the Settlement Agreement)(emphasis added). Relying on the express language of the agreement, the Court ruled from the bench that individual employers could not be released from the consent decree, even upon achieving the 25% goal, until minority employment reached 25% in the industry. *Id.* at 125-26. The Court deferred its decision on the motion to terminate the decree until defendants could produce sufficient evidence to demonstrate that minority employment in the bargaining unit is at 25% throughout the industry as a whole. *Id.* at 132.

On July 22, 1987, the Administrator ruled that the News and the Union had violated the settlement agreement by adding ten non-minorities and only four minorities to the News's November 4, 1986 group III list, and he ordered the placement of eleven minorities on the list. The Union has appealed.

## II. Discussion

Paragraph fifteen of the settlement agreement mandates that three minority employees be added to the News's group III list for every two non-minorities. There are no exceptions to this rule.

The Union argues, however, that the Administrator's decision in July 1987 was in conflict with his prior approval, by his November 1986 letter, of an exemption for the News

from the terms of the agreement. In the Union's view, the Administrator's reversal was not justified by a change in circumstances; minority employment at the News in July of 1987 was still in excess of 25% as it was when the administrator issued his letter in November, 1986. Accordingly, the Union asserts that the Administrator's decision in July 1987 should be overturned as arbitrary and capricious.

The Union's argument ignores the significance of the hearing held before this Court in February 1987. At that hearing the Court ruled that the affirmative action program could not be terminated until the entire industry had achieved the 25% goal. The Administrator placed special emphasis on this ruling in his opinion, stating, "Despite recent challenges to it by the defendants, the Decree has *not* been terminated or modified by the Court; it is still in full force and effect and binding on the parties and the Administrator." Record on appeal at 4 (emphasis in original). Thus, the administrator's ruling was justified by his reliance on the hearing before this Court, and clearly was neither arbitrary nor capricious.

The Union also contends that the administrator's decision does not appropriately construe paragraph fifteen of the settlement agreement. In support of this contention, the Union relies on language in paragraphs seven and eleven, which refer to the affirmative action plan set forth in paragraph fifteen as the "new hiring procedure." On the basis of this language, the Union concludes that the affirmative action plan was only intended to apply to persons who are "new hires," that is, persons who have never before worked in the industry. Since the non-minorities who were advanced to the group III list and shaped for previous shifts at the News, they were not new hires, and therefore were not subject to the affirmative action plan.

The Union's reasoning is nothing more than sophistry. The agreement makes no reference to so called new hires.

It refers to a "new hiring procedure." This merely acknowledges that the hiring procedure described in paragraph fifteen is new in that it modifies the old hiring procedure that was employed under the collective bargaining agreement.

Finally, the Union asserts that the affirmative action program should be terminated as to the News because minority employees at the News already constitute more than 25% of the work force. It is well established that affirmative action programs must be terminated once the target racial balance is reached. *See Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 11456 (1987); *Local 2, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S.Ct. 3019, 3052 (1986); *United States Steel Workers of America v. Weber*, 443 U.S. 193, 208,09 (1979). As discussed above, however, the Court concluded at the February 1987 hearing that the agreement established a goal of 25% minority employment in the bargaining unit throughout the entire industry. The Court refused to lift the decree as to individual employers even though they may have achieved the 25% goal. The evidence submitted at that hearing failed to prove 25% minority employment in the industry, and the Union has not submitted any new evidence on this appeal. Therefore, the 3:2 hiring ratio still applies.

III. Conclusion

For the foregoing reasons, the decision and order of the administrator is affirmed in all respects.

So Ordered.

JOHN E. PATTERSON, *et al.*,
Plaintiffs

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,
Defendants.

In the Matter of the Group III List of
THE NEW YORK TIMES, pursuant to the
terms of the Settlement Agreement.
U.S.D.C., S.D.N.Y.

73 Civ. 3058 (WCC). 73 Civ. 4278 (WCC).
Claim No. 186

United States District Court,
S.D. New York
Sept. 25, 1991

## OPINION AND ORDER

WILLIAM C. CONNER, District Judge.

A class of private plaintiffs and the Equal Opportunity Commission ("EEOC") brought two civil rights actions in 1973 against the Newspaper and Mail Deliverers' Union of New York and Vicinity ("NMDU" or "Union") and more than fifty news publishers and distributors within the Union's jurisdiction. Both suits charged that the Union, with the acquiescence of the publishers and distributors, had historically discriminated against minorities, and that the structure of the collective bargaining agreement, combined with nepotism and cronyism, had perpetuated the effects of past discrimination in violation of Title VII of the Civil

Rights Act of 1964. Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in the newspaper delivery industry but for the alleged discriminatory practices.

On September 19, 1974, then-District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties and incorporating the Settlement Agreement in a Consent Decree, familiarity with which is presumed. *See Patterson v. Newspaper and Mail Deliverers' Union,* 384 F.Supp. 585 (S.D.N.Y. 1974) *aff'd,* 514 F.2d 767 (2d Cir. 1975), *cert. denied,* 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976). The Settlement Agreement implements an affirmative action program which modifies the hiring procedures for newspaper deliverers under the industry-wide collective bargaining agreement. Under the consent decree, each employer maintains a work force of regular situation holders for its minimum delivery needs. To accommodate fluctuations in circulation, the publishers are permitted to supplement their work force with daily shapers.

The daily shapers are divided into three groups with descending hiring priorities. Those shapers on the Group I list have first priority after the regular situation holders, in order of their shop seniority. The next priority belongs to Group II shapers. Group II consists of all persons holding regular situations or Group I positions with other employers in the industry. The last priority belongs to Group III shapers.

The Settlement Agreement also established an Administrator, appointed by the Court, to implement the provisions of the Consent Decree and to supervise its performance. The Settlement Agreement authorizes the Administrator to hear claims concerning violations of the Consent Decree. Appeals from his decisions are heard in this Court.

Pursuant to the Settlement Agreement, plaintiffs seek

review of a determination by Administrator William S. Ellis, Esq. (the "Administrator"), denominated "Claim 186." I have reviewed the exhibits and testimony relied upon by the Administrator, as well as the arguments submitted to the Court by the various parties. For the Reasons set forth below, the Administrator's decision is affirmed.

## BACKGROUND

In the Spring of 1984, in the belief that the goal of 25% minority employment in the industry had been reached, the Union and most of the defendant employers moved to vacate the Consent Decree in its entirety, or in the alternative, to modify the decree to eliminate the affirmative action provisions. During the period that followed the making of these motions, the matter of Claim 186. The New York Times ("Times") and the Union wished to expand the Group III list to approximately 160 employees and to avoid the 3/2 ratio required by paragraph 15 of the Settlement Agreement.

In February 1985, the Times and the NMDU approached the Administrator to seek his authorization to permit the issuance of a Group III list which would not conform to the 3/2 ratio. The Administrator declined to agree to such a modification, informing the parties that for such authorization to be given, it would have to be with the consent of all the parties to the Consent Decree with the approval of the court.

The Administrator issued an order on August 13, 1985 that such a list should not be issued. Although the Settlement Agreement establishes a procedure for the appeal of Orders of the Administrator, the defendants did not appeal the Administrator's order freezing the Times' Group III list. *See* Settlement Agreement at ¶4. In direct contravention of both the Settlement Agreement and the Administrator's Order, the Adjustment Board of the Times and the Union proceeded to issue a new Group III list of

approximately 175 names effective August 15, 1985.[1] A minority person was placed into every fourth position on the new list. Prior to the issuance of the Preliminary Group III list, the Group III list of the Times had rarely been greater than 40 employees.[2]

On August 20, 1985, the Administrator directed the Times and the NMDU not to use this Preliminary Group III list. The NAACP Legal Defense Fund ("LDF") and the EEOC objected to the list. A hearing before the Administrator was scheduled for August 26, 1985 to consider the objections raised by LDF. At that hearing, after all sides were afforded a full opportunity to be heard, the Administrator directed that (1)a notice should be attached to the Preliminary Group III list emphasizing that it was temporary and subject to the hearing to be held before the Administrator and (2) the Adjustment Board hear the complaints of certain individuals, adding such names as appropriate to the bottom of the list. The Administrator also ordered that the list comprise 30% minority persons. Finally, the Administrator ruled that so long as the persons on the list were qualified a provided in the Adjustment Board's conditions to the list, the Times could hire them from the list while the litigation proceeded. Transcript 114-115, 120.

It was the understanding of all parties that this proceeding would be resolved in two or three weeks and that a new list would be issued with the approval of the Administrator. The hearing started in October 1985, and it was not completed until approximately 6000 pages of

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[1] The Adjustment Board is provided for in the collective bargaining agreement. It is composed of two Times and two NMDU representatives.

[2] At the time that the Preliminary Group III list was issued in August 1985. The Times had reached a minority employment percentage of 30.14%. The industry-wide figure was 24.4%.

transcript later, in July 1988.

*The Administrator's Findings*

At the hearings the parties presented extensive evidence concerning the formation of the Preliminary Group III list. Based on the evidence presented in the case the Administrator concluded that both the Times and the NMDU had violated the following provisions of the Settlement Agreement:

1. Paragraph 15, dealing with the 3/2 ratio required of the Group III list.[3]

The Administrator found that in light of his refusal to modify the Settlement Agreement in order to permit less than the 3/2 ratio, the Times and the NMDU were obligated to follow paragraph 15 or, in the alternative, to seek recourse to this Court for the purpose of obtaining authorization for such modification. In the face of no such authorization, the Administrator concluded that the Adjustment Board had violated paragraph 15 of the Settlement Agreement whit issued the Preliminary Group III list.

2. Paragraph 15, dealing with the standards to be followed in giving preferences to certain employees to be place on a Group III list.

The Administrator found that the evidence indicated that the primary basis for placing and positioning persons on the Preliminary Group III list was determined by the seniority of one's sponsor at the Times. If the sponsor, who

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[3] This term means that for every five employees added to the Group III list, three were to be minorities and two were to be non-minorities.

Paragraph 15 provides in relevant part:

> Defendant employers shall offer positions available ... on the basis of three (3) minority employees for every two (2) other employees.

was usually the father or some other relative of the applicant, had seniority at the Times, the position of the applicant was determined by reference to such sponsor's seniority. Although the Times attempted to prove that there were other criteria such as (a) shifts worked, (b) tractor-trailer driving ability, and (c) commitment and interest, which were taken into account in determining the placement of an applicant on the proposed Group III list, the Administrator found that such other criteria played but a minor role in the decision. The Administrator's Determination in Claim 186 dated February 27, 1991 ("Administrator's Determination") at 47. Based on the evidence before him the Administrator concluded that the Times and the Union had discriminated in violation of paragraph 15 of the Settlement Agreement.

3. Paragraph 29, dealing with the establishment of a system for the submission of applications.

The testimony given before the Administrator indicated to him that the method by which an applicant applied for placement on the Preliminary Group III list was to give a slip of paper with the name and social security number of the applicant to a foreman or a union official.[4] These slips of paper were collected and treated by the Adjustment Board as applications for Group III. The testimony of various officials who handled these applications indicated that at times no one was sure who was keeping them or where they were being kept. This method of submitting applications for placement on Group III is not set forth in any official document of either the Times or the NMDU or in the Settlement Agreement.

The Administrator found that minority persons were not usually told about this method of submitting applications.

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[4] If any Times' employee submitted a slip of paper on behalf of another person he became known as a sponsor.

In the instances in which they were told, the Administrator found that they were often given incorrect information.

In addition a formal application was available in the lobby of the Times' building. Several minority claimants were found to have filled out such applications. The Administrator found, however, nothing in the testimony to suggest that the Times ever looked at these applications. Though the policy of the Times required that these formal applications be submitted to the Delivery Department for consideration, the Administrator found that these applications were not reviewed by the Delivery Department prior to making the new Group III list.

4. Paragraphs 1 and 2 in reference to discriminatory treatment in the offlist hiring of minority employees and in the various practices of the industry.

The language of paragraphs 1 and 2 of the Settlement Agreement provides that the defendants are prohibited from discrimination in purpose and effect. Under the terms of the Settlement Agreement all activity on the regular situation list, the Group I list, and the Group III list is regulated. Parties to the Settlement Agreement have no discretion to act except pursuant to its terms. In contrast to its procedure for hiring of individuals on the Group I, II and III lists, the Times had no policies or procedures to govern selection of offlist workers but for the general prohibitions of the Settlement Decree.

Based upon the evidence presented, the Administrator found that each of the claimants proved an individual claim of racial discrimination in violation of paragraphs 1 and 2 of the Settlement Agreement with regard

to offlist hiring.[5]

Moreover, the Administrator concluded that since the new Group III list took into account various hiring records which had been developed during offlist hiring, the discriminatory hiring affected the composition and order of the new Group III list. The Administrator found that the evidence supported eighteen individual claims of intentional discrimination with regard to exclusion from or low placement on the Group III list.

Three non-minority, non-union, intervenors, Richard M. Johnson, Richard W. Johnson, and Donald Schley alleged that the Times and the NMDU had violated paragraphs 15 and 29 of the Settlement Agreement and that such alleged violations had an adverse affect on them. The Administrator dismissed their claims for lack of standing.

*Remedies*

In light of his findings of fact and conclusions of law the Administrator prepared a Group I list on a one-to-one basis, consisting of 48 minorities and 48 non-minorities and a Group III list, as of September, 1985.[6] The Administrator also awarded back pay to those claimants whom he found to have proved individual claims of discrimination with regard to the creation of the Preliminary Group III list. The back pay award covered the period from the date of the issuance of the Preliminary Group III list to November 30, 1988, the

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[5]The Administrator concluded that the plaintiffs failed to prove that there was a pattern and practice of intentional discrimination and that the new list had an adverse impact. Administrator's Determination at 59.

[6]In the fall of 1988, the Administrator applied to the Court for permission to issue an Interim Group I list due to delays in the resolution of Claim 186. The court granted the application by an order dated November 30, 1988 in Claim 229. An Interim Group I list was issued soon thereafter.

date on which the Interim Group I list was issued.[7]

As discussed above, the Administrator found that defendants engaged in intentional racial discrimination against all of the claimants in offlist hiring. The Administrator further concluded that "each [of the claimants] is entitled to an appropriate remedy for the [offlist hiring] violation." Administrator's Determination at 57. The Administrator failed to state explicitly what type of remedy should be imposed for this violation.

Finally, the Administrator ruled that the LDF was entitled to Attorneys' Fees.

## DISCUSSION

The Agreement provides the Administrator with broad authority to take all actions he deems necessary to implement the provisions and to ensure the performance of the Order. It further provides that the Administrator shall hear and determine a wide variety of claims arising under the Agreement, which may then be brought before the Court for review. Agreement ¶ 4.

In *Foreman v. Wood, Wire & Metal Lathers International Union, Local No. 46*, 557 F.2d 988, 992 (2d Cir. 1977), the Court of Appeals for the Second Circuit noted that the Scope of review of an independent administrator appointed to ensure compliance with a settlement decree was similar to that applied to an arbitrator's decision. More recently in *United States v. International Brotherhood of Teamsters, Etc.*, 905 F.2d 610, 616 (2d Cir. 1990), the Second Circuit Court reiterated that an administrator's decision is "entitled to great deference." Thus, it is clear that an administrator's decision cannot be rejected merely because a court may be inclined to reach a different result.

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[7]Back pay was to include benefits, vacation pay, pension contributions, and interest on any back pay award.

The Times places great emphasis on its position as "the pacesetter in the industry in affording bargaining unit employment opportunities to minorities." Times Brief at 13. Both the Times and the NMDU argue that the Adjustment Board issued the Preliminary Group III list at a time when it appeared that departure from the 3:2 ratio was permissible if not required. Relying on the fact that the "Times Delivery Department work force was approximately 30% minority, the Times and the Union argue that "there was strong reason for believing it was unlawful to continue following the 3:2 ratio" in light of the Supreme Court decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) (ruling that affirmative action quotas were not without limitation). Times Brief at 18.

This Court is cognizant of the Times record but notes, nevertheless, that the Times and the NMDU took matters into their own hands in open disregard of the plain language of the Settlement Agreement and the explicit order of the Administrator. This they cannot do. A court order must be obeyed. This Court hereby affirms the Administrator's conclusion that the Times and the Union's unilateral noncompliance with the 3:2 ratio set out in Paragraph 15 constitutes a violation of the Consent Decree. Because the Court affirmed the Administrator's finding of a violation of Paragraph 15 on this ground, it does not reach the question whether consideration of sponsorship "as the factor which determined the weight to be given to other factors" violated the preference requirements of paragraph 15 of the /settlement Agreement.

Paragraph 29 provides in pertinent part:

> Applicants for employment with any defendant employer shall report to such office during normal business hours to complete applications for listing on the extra lists at a particular employer, and such applications shall be available only at such office or offices. The Administrator shall receive a monthly

report concerning said applications.

The Administrator interpreted this paragraph as an attempt to "establish a system for the filing of applications which set forth qualifications of the applicant, in a central place available to all, with procedures which afforded an equal opportunity to all interested persons, and which required on a standardized form a request for the type of information that an employer interested in truck drivers and deliverers would need." Administrator's Determination at 48. The Administrator found, on the basis of the evidence presented before him, that the application procedures for the Preliminary Group III list violated Paragraph 29 the Settlement Agreement. This Court finds no basis for reversal of such finding.

Both the Times and the NMDU argue that the selection of off-list hires was not founded on racial consideration but, rather, on the bona fide judgment of foremen regarding past performance and/or expected reliability of drivers. The Administrator rejected these arguments, finding them "pretextual and not credible." Administrator's Determination at 55. The Administrator further concluded that, with regard to eighteen of the claimants, the defendants did not offer credible reasons for their relative placement on or exclusion from the Preliminary Group III list. the Administrator found further that defendants failed to sustain their burden of articulating non-discriminatory reasons for their adverse treatment of the claimants.

This Court, upon consideration of the record and the briefs submitted, finds no basis for concluding that the Administrator's decision was arbitrary or for substituting its judgment for that of the Administrator. This Court recognizes that the Administrator's hearing on Claim 186 covered a period of three-and-a-half years and that approximately 6,000 pages of testimony were taken. He has rendered a reasoned decision that is clearly within the scope

of the authority given to him by the Settlement Agreement. it is obvious that he did not act hastily or without having access to all of the relevant facts. While it may be argued that these findings do not represent the only set of conclusions which the evidence might have supported, I find them to be reasonable and not capricious, arbitrary, or manifestly unfair and therefore affirm that portion of the Administrator's Determination finding intentional discrimination against all claimants in offlist hiring and against eighteen claimants in the creation of the Preliminary Group III list.[8]

* * *

*Remedies*

As the Times notes, "the formation of these lists is not a simple task." Times Brief at 17. This Court concurs and finds that in crafting the Second Revised Interim Group I list in March 199o, the Administrator reconstructed as closely as possible the status that successful claimants would have held if the Settlement Agreement had not been violated and racial discrimination had not occurred. Those persons heretofore on the Second Revised Interim Group I list at the Times shall be considered hereafter members of Group I. The Union is directed to issue Union cards to all of the employees on Group I. The Union is directed to give priority numbers to the first one-fourth of the Group I list as if they had been inducted on September 1, 1986, and to the second half of the Group I list as if they had been inducted on September 1, 1988.

The Times argues that any monetary relief is neither required nor appropriate even assuming, *arguendo*, that

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[8]This Court does not reach the question of whether the Administrator ruled correctly in concluding that the evidence did not support a finding of a pattern and practice of intentional discrimination or of adverse impact.

violations of the Settlement Agreement were committed, because no back pay award is cognizable under the Settlement Agreement. While Paragraph 37 established a back pay fund in connection with the settlement of the *Patterson* action, nowhere in the Settlement Agreement is there an affirmative statement ordering back pay for violations of the Settlement Agreement. The Times argues that "[p]lainly the parties to the Settlement Agreement knew how to indicate that back pay could be ordered" as a general remedy had such been their intention. Times Brief at 107. The Times argues that the absence of an affirmative statement to that effect is most telling.

It is clear that the parties to the Settlement Agreement intended the Consent Decree to subsume alleged violations of Title VII.[9] This is borne out by the language of the Settlement Agreement providing:

> The Order resolves all issues between plaintiffs and defendants, who have agreed hereto, relating to alleged acts and practices of discrimination by said defendants to which the Order is directed, and with respect to such matters, compliance with the Order shall be deemed to be compliance with Title VII and shall be deemed to satisfy the requirement for affirmative action by said defendants or any of them. The doctrines of *res judicata* and collateral estoppel shall apply to all plaintiffs with respect to all issues of law and fact and matters of relief within the scope of the complaint or the Order.

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[9]The provisions of the Settlement Agreement do not indicate that plaintiffs *waived* their Title VII rights by agreeing to submit Title VII claims (of the type contemplated by the Consent Decree) to the Administrator. On the contrary, submission of such grievances is the functional equivalent of a plenary lawsuit, since compliance with the Consent Decree is tantamount to compliance with Title VI. Settlement Agreement ¶ 42. Moreover, appeals from the determinations of the Administrtor are heard in this Court.

Settlement Agreement at ¶ 42. This identification between the terms of the Settlement Agreement and the requirements of Title VII indicates the parties' intent that discrimination claims be remedied through the Consent Decree's specific enforcement procedures.

For the past sixteen years the Administrator has been hearing and determining claims brought by NMDU members regarding discriminatory treatment and denial of equal opportunity within the New York newspaper industry. The large majority of such claims have involved individuals who were not members of the private class of plaintiffs in 73 Civ. 3058.

Until a recent federal action filed by the LDF there have been, since the entry of the Final Order approving the Settlement Agreement, no lawsuits filed against any defendant alleging discrimination in the bargaining unit represented by the NMDU. Instead, allegations of discrimination have either been settled directly with claimants or presented to the Administrator.

During this sixteen-year period the EEOC and the New York State Division of Human Rights ("NYSDHR") have forwarded to the Administrator for his exclusive consideration almost all charges of discrimination filed by NMDU members with these agencies. On some occasions, such discrimination charges were not forwarded to the Administrator because the employers settled the complaints directly with the individuals involved, the EEOC and/or the NYSDHR without the need for the Administrator's intervention.

It is clear beyond question that the judicially approved and monitored Settlement Agreement expressly authorized the Administrator to adjudicate claims of discrimination. It has long been the position of this Court that if an individual seeks to remedy a wrong contemplated by the Consent Decree, that individual could apply to the

Administrator for relief pursuant to the Consent Decree. Paragraph 42 provides that compliance with the Settlement Agreement in compliance with Title VII and accords a *res judicata* effect to the all issues of law and fact and matters of relief resolved by the Administrator.[10] Retroactive seniority and back pay are routinely awarded to victims of racial discrimination in violation of Title VII. The Settlement Agreement cannot afford complainants fewer types of relief than are available through Title VII litigation. To hold otherwise would deprive complaints under the Settlement Agreement of the remedies available to them through Title VII litigation. Accordingly, this Court concludes that the Settlement Agreement, while not explicitly authorizing the Administrator to award back pay, does not proscribe the award of back pay.

The Times argues that back pay is unwarranted since the purpose of this proceeding was to resolve the competing claims of individuals for placement on the list and that as such, the action was in the nature of an interpleader suit, with the Times akin to a stakeholder. The Times argued that it was "disinterested" in the composition of the Preliminary Group III "so long as the personnel are competent and its staffing requirements are satisfied." Times Brief at 105. The Administrator rejected this argument. Even if the Group III positions were analogized to a stake of money or property, defendants' roles here are not those of stakeholders. Rather than turn the stake over to the Court or to the Administrator, defendants issued and applied the list in violation of both the judicial decree and the

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[10] The Court expresses no view as to whether the Administrator's jurisdiction of discrimination claims within the scope of the Consent Decree is exclusive, although it is difficult to see how court rulings rulings in Title VII actions brought by individual plaintiffs seeking more favored positions on the employment ladder could fail to interfere with the intricate and delicately balanced scheme of affirmative action established by the Decree.

Administrator's explicit order. Even if the defendants request to the Administrator for permission to depart from the 3/2 ratio might be construed as analogous to an interpleader action, the interpleader rules do not allow the stakeholder to begin an interpleader action and then precipitously turn over the money or property to one claimant while the court is deciding how to rule on the interpleader.

The Supreme Court in Albemarle Paper Co. v. Moody 422 U.S. 405, 422, 95 S. Ct. 2362, 2373-74, 45 L.Ed.2d 280 (1975) set out the governing standard for the award of back pay:

> [B]ackpay should be denied only for reasons which, if applied generally, would not frustrate the statutory purposes of eradicating discrimination throughout the economy and making persons who for injuries suffered through past discrimination.

These statutory purposes [leave] little room for the exercise of discretion not to order reimbursement." *Id.* at 417, 95 S.Ct. at 2371.

In this case, the Administrator, who heard all of the evidence and the defendants' arguments, determined that no exception applies and that back pay is an appropriate and necessary remedy for the eighteen claimants who prevailed on claims of intentional discrimination.

The Administrator's conclusion that back pay is an available remedy under the Settlement Agreement is affirmed. The Administrator is directed to hold evidentiary hearings to determine the amount of back pay due and owing to all of the claimants in Claim 186 but for McCargo, Harvey, Streety, and the three non-minority intervenors. The Administrator is further directed to hold an evidentiary hearing for the purpose of determining the relative liability

of The Times and the NMDU.[11]

Title VII establishes a strong presumption in favor of an award of fees to the prevailing plaintiff. The court in Albemarle, supra, relied upon the "strong public interest in actions brought under Title VII to eradicate discriminatory practices" in holding that attorneys' fees should be awarded to successful plaintiffs " in all but very unusual circumstances." 422 U.S. at 415, 95 S.Ct. at 2370. The same right to attorneys' fees applies where, as here, plaintiffs prevail in a proceeding to enforce a settlement agreement. This Court affirms that Administrator's determination that attorneys' fees are recoverable under the Consent Decree and his award of attorneys' fees to he LDF in the instant case.

The Administrator has not recommended that the Times and the Union be held in contempt, finding that little purpose would be served at this time by such a recommendation. This Court concurs and denies the LDF's motion of January 21, 1991 asking the Court to refer the issue of defendants' criminal contempt to the United States Attorney for investigation and determination whether to prosecute.

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[11]The Court affirms the Administrator's determination that the Times and the NMDU are jointly responsible for above-mentioned violations of the Settlement Agreement.

The Union interprets the Administrator's finding that the NMDU and the Times are jointly responsible as meaning that both parties are fifty percent responsible. The Court rejects the NMDU's interpretation. The Administrator is directed to hold an evidentiary hearing to determine the relative culpability of the parties so as to apportion properly liability for monetary compensation. While the Administrator may well conclude that the Times and the NMDU are equally responsible, such decision has not yet been made.

## CONCLUSION

For the reasons stated herein the Court affirms the Administrator's Determination of February 27, 1990.

The Administrator is directed to hold evidentiary hearings to determine the amount of back pay due and owing to all of the claimants in Claim 186 but for McCargo, Harvey, Streety, and the three non-minority intervenors. The Administrator is further directed to hold an evidentiary hearing for the purpose of determining the relative liability of The Times and the NMDU.

The question of what relief is appropriate in light of the Administrator's finding of offlist hiring discrimination is remanded to the Administrator for a determination not inconsistent with the views expressed in this opinion.

The motion of the NAACP Legal Defense Fund requesting that this Court refer the question whether defendants should be prosecuted for criminal contempt to the United States Attorney is hereby denied.

SO ORDERED

Nos. 73 Civ. 3058 (WCC).
73 Civ. 4278 (WCC).

United States District Court
S.D. New York.

JOHN E. PATTERSON, et al.,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants.

September 30, 1991.

**OPINION AND ORDER**

WILLIAM C. CONNER, District Judge. A class of private plaintiffs and the Equal Employment Opportunity Commission ("EEOC") brought two civil rights actions in 1973 against the Newspaper and Mail Deliverers' Union of New York and Vicinity ("NMDU" or "Union") and more than fifty news publishers and distributors within the Union's jurisdiction. Both suits charged that the Union, with the

acquiescence of the publishers and distributors, had historically discriminated against minorities, and that the structure of the collective bargaining agreement, combined with nepotism and cronyism, had perpetuated the effects of past discrimination in violation aid Title VII of the Civil Rights Act of 1964. Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in the newspaper delivery industry but for the alleged discriminatory practices.

On September 19, 1974, then-District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties and incorporating the Settlement Agreement in a Consent Decree, familiarity with which is presumed. *See Patterson v. Newspaper and Mail Deliverers' Union*, 384 F. Supp 585 (S.D.N.Y. 1974) *aff'd* 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976). The case is presently before the court on the motions of defendants New York Times ("Times"), Maxwell Newspapers, Inc. ("Maxwell"), New York Post ("Post"), and the NMDU to modify or vacate the Final Order and Judgment and accompanying Settlement Agreement ("Consent Decree") entered in this action in 1974.

**BACKGROUND**

The principal purpose of the Consent Decree, which defendants entered "without admission by any defendant of a violation of Title VII . . . or . . . 42 U.S.C. § 1981, and without any finding by the Court that any defendant has discriminated against any person or persons because of race, color or national origin," was "to correct the statistical imbalance [of minority individuals]" by "put[ting] minority individuals in the positions they would have occupied had the aforesaid statistical imbalance not existed." The consent Decree set a "goal" of 25% minority employment in the industry, which was defined as "not an inflexible quota but an objective to be achieved by the mobilization of available

personnel and resources ... in a good faith effort to maximize employment opportunities in the bargaining units in the industry represented by the NMDU." *See* Settlement Agreement at ¶ 8. The Decree provided, as the means for achieving this 25% goal, an Affirmative Action program setting specified ratios for the employment and advancement of minority persons.

Under the consent decree, each employer maintains a work force of regular situation holders for its minimum delivery needs. To accommodate fluctuations in circulation, the publishers are permitted to supplement their work force with daily shapers.

The daily shapers are divided into three groups with descending hiring priorities. Those shapers on the Group I list have first priority, after the regular situation holders, in order to their shop seniority. The next priority belongs to Group II shapers. Group II consists of all persons holding regular situation or Group I positions with other employers in the industry. The last priority belongs to Group III shapers.

The Affirmative Action program eliminates the contract provisions that restricted Group I to former regular situation holders, and provides for the orderly flow in Group III shapers into Group I, and from there into regular situations. The agreement mandates that for each non-minority Group III member elevated to Group I, a minority Group III member must also be elevated. Settlement Agreement at ¶ 11. In addition, for every two non-minority persons added to the Group III list, three minority persons must be added. *Id.* at ¶ 15. Regular situations are filled as they become available by advancing the most senior Group I member without regard to race, color, or national origin. *Id.* at ¶ 10(c).

By Order dated November 30, 1988, after finding that the goal of 25% minority hiring had been surpassed, this

Court suspended those provisions of the Settlement Agreement which required 3:2 and 1:1 ratios for placement of individuals on the Group III and Group I lists, respectively, as well as other affirmative action provisions of the Settlement Agreement which had a direct impact on the minority employment goal.

The Settlement Agreement also establishes and Administrator, appointed by the Court, to implement the provisions of the Consent Decree and to supervise its performance. The settlement Agreement authorizes the Administrator to hear claims concerning violations of the Consent Decree. Appeals from his decisions are heard in this Court.

On April 17, 1985, the Times moved for an order, pursuant to Paragraph 7 of the Final Order and Judgment in this matter dated October 24, 1974, and Rule 50(b). Fed.R.Civ.P., vacating or modifying said Final Order and Judgment on the grounds that (1) the terms of the Final Order and Judgment have been satisfied and (2) relief therefrom is justified under present circumstances.[1] On February 23, 1987, the Court held a hearing to consider defendants motion to terminate the Settlement Agreement. The Court ruled from the bench "that notwithstanding that some employers had reached or exceeded the 25% figures within their respective operations," the goal called for in the Settlement Agreement incorporated in the Consent Decree called for "25% minority employment in the industry." *See* Opinion and Order dated March 15, 1988 at 6-7, 1988 WL 31866. Finding that the 25% goal had not been met industry-wide, this Court deferred its decision on the motion to terminate the Consent Decree until defendants could produce sufficient evidence to demonstrate that minority employment in the bargaining unit had reach 25% through

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[1]On or about April 23, 1985, New York News Inc., the then publisher of the New York Daily News, made a similar motion.

the industry as a whole.

On May 30, 1991, having reviewed quarterly reports which indicated that the 25% goal had been met and exceeded, this Court restored the motions to its calendar in order to take the steps necessary to render a decision. As part of this process, the court directed the Interim administrator to submit compliance reports of all the companies subject to the Settlement Agreement. The Court indicated that upon receipt of the Administrator's findings and after review of submission by the parties, it would address the motions of defendants to modify or terminate the Consent Decree.

## DISCUSSION

The Administrator, who is charged to implement the provisions and supervise the performance of the Settlement Agreement, reviewed and evaluated the submissions of each company under his jurisdiction for the purpose of determining compliance with the terms of the Settlement Agreement. After considering all the reports submitted, the Administrator concluded that the minority figure of 28.53% suggested substantial compliance for the industry. Report of the Interim Administrator concerning the Compliance Reports, September 9, 1991 ("Report") at 9.

The NAACP Legal Defense Fund ("LDF") argues, however, that this report is simply a summary of numbers provided by the employers to the Administrator and that the Administrator has taken no action to verify that the numbers actually represent persons working at the various employers and that the persons listed as minorities are actually minority individuals. The LDF maintains that, to the extent that the current percentage of minorities in the industry is relevant to the determination of the pending motion, the Court must grant plaintiffs discovery and allow for an evidentiary hearing on this issue before reaching the merits of defendants'

arguments.[2]

The LDF argues that defendants have not proved with admissible evidence that a 25% minority representation has been reached. Moreover, the LDF has stated that it would object to any motion for entry of the Compliance Reports into evidence as the submissions are "overwhelmingly unverified, self-serving hearsay, unsupported, and unreliable."[3] Thirteen of the fourteen employer submissions are unsworn. The Administrator has not placed in evidence an affidavit verifying the information contained in the compliance reports on the basis of his examination of those reports and independent investigation.

The LDF raises serious questions as to the accuracy and reliability of the Compliance Reports. It is necessary to resolve any question regarding the accuracy of said reports before reaching the merits of defendants' pending motions to terminate the Consent Decree. Before exercising its power to modify, a court must be convinced by the party seeking relief that existing conditions differ so substantially from those which precipitated the decree as to warrant judicial adjustment.

## CONCLUSION

This Court hereby directs each defendant to file an affidavit with the Administrator verifying the information contained in the previously filed compliance reports. If plaintiffs feel that discovery on compliance continues to be warranted subsequent to such submissions, they will be

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[2]LDF argues that it was unable to undertake a complete analysis of the unverified information contained in those documents since it only received the documents in the early evening of September 10, 1991, four days before the dead line to file it surreply.

[3]The LDF also objects to entry and consideration of the Administrator's Report as it is alleged to be based on wholly unverified data.

allowed limited discovery to investigate the facts underlying the data provided and to verify their accuracy. If plaintiffs so request, the Administrator shall conduct an evidentiary hearing following the close of discovery to determine the validity of defendants' compliance reports. Plaintiffs will hear the burden of proof to show that such reports are incorrect. This Court hereby defers consideration of defendants' motions to modify or terminate the Consent Decree until such time as it receives the Administrator's final report, based upon verified data, that the 25% minority employment figure has been achieved.

SO ORDERED.

Nos. 73 Civ. 3058 (WCC).
73 Civ. 4278 (WCC).

United States District Court
S.D. New York.

JOHN E. PATTERSON, et al.,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants.

July 8, 1992.

OPINION AND ORDER

WILLIAM C. CONNER, District Judge.

A class of private plaintiffs and the Equal Employment Opportunity Commission (the "EEOC") brought two civil rights actions in 1973 against the Newspaper and Mail Deliverers' Union of New York and

Vicinity (the "NMDU" or "Union") and more than fifty publishers and news distributors having collective bargaining agreements with the Union. Both suits charged that the Union, with the acquiescence of the publishers and distributors, had historically discriminated against minorities, and that the structure of the collective bargaining agreement, combined with nepotism and cronyism, had perpetuated the effects of past discrimination in violation of Title VII of the Civil Rights Act of 1964. Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in the newspaper delivery industry but for the alleged discriminatory practices.

On September 19, 1974, then-District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties and incorporating the Settlement Agreement in a Consent Decree, familiarity with which is presumed.[1] *See Patterson v. Newspaper and Mail Deliverers' Union*, 384 F.Supp. 585 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976).

The Settlement Agreement established a goal of 25% minority employment in the industry within NMDU bargaining units. *See* Settlement Agreement at ¶ 7. That "goal" was defined as "not an inflexible quota but an objective to be achieved by the mobilization of available personnel and resources . . . in a good faith effort to maximize employment opportunities for minorities in the bargaining units in the industry represented by NMDU." *See* Settlement Agreement at ¶ 8. To achieve this goal the Settlement Agreement implements an affirmative action program which modifies the hiring procedures for newspaper deliverers under the industry-wide collective bargaining

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[1] The Settlement Agreement is divided into four sections: Equitable Relief (¶¶ 1-2), The Administrator (¶¶ 3-6), Affirmative Action Program (¶¶ 7-27), and General Provisions (¶¶ 28-42).

agreement. Under the Consent Decree, each employer maintains a work force of regular situation holders for its minimum delivery needs. To accommodate fluctuations in circulation, the publishers are permitted to supplement their work force with daily shapers.

The daily shapers are divided into three groups with descending hiring priorities. Those shapers on the Group I list have first priority, after the regular situation holders, in order of their shop seniority. The next priority belongs to Group II shapers. Group II consists of all persons holding regular situations or Group I positions with other employers in the industry. Last in order of priority are the Group III shapers.

The Settlement Agreement provides for the orderly flow of Group III shapers into Group I, and from there, into regular situations. The Agreement mandates that for each non-minority Group III member elevated to Group I, a minority Group III member must also be elevated. Moreover, the Agreement requires that for every two non-minority persons added to the Group III list, three minority persons must be added. Through this process, it was intended that the proportion of minority workers in the industry would increase to the 25% goal by June 1979. *See* Settlement Agreement ¶¶ 11, 12, 15. When that goal was not reached by the specified date, the relevant provisions were extended and later extended again.

The Settlement Agreement also established an Administrator, appointed by the Court, to implement the provisions of the Consent Decree and supervise its performance. The Settlement Agreement authorizes the Administrator to hear claims concerning violations of the Decree. Appeals from his decisions are heard in this Court.

## BACKGROUND

On April 17, 1985, the New York Times (the "Times") moved for an order, pursuant to Paragraph 7 of the Final

Order and Judgment in this matter dated October 24, 1974, and Rule 60(b), Fed.R.Civ.P., to vacate or modify said Final Order and Judgment on the grounds that (1) the terms of the Final Order and Judgment have been satisfied; and (2) relief therefrom is justified under present circumstances.[2] On February 23, 1987, the Court held a hearing to consider defendants' motion to terminate the Settlement Agreement. At the conclusion of the hearing, the Court ruled from the bench that notwithstanding that some employers had reached or exceeded the 25% figure within their respective operations, the goal to be realized was "25% minority employment in the industry." *See* Hearing Transcript at 125. Accordingly, this Court deferred its decision on the motion to terminate the Decree until defendants could produce sufficient evidence to demonstrate that minority employment in the bargaining unit had reached 25% throughout the industry as a whole.[3]

On May 30, 1991, having reviewed compliance reports which indicated that the 25% goal had been met and exceeded, this Court restored defendants' motion to vacate the Consent Decree to its calendar. In order to aid it in rendering a decision, the Court directed the Interim Administrator to submit compliance reports of all defendant companies. On September 9, 1991, the Interim Administrator issued a Report in which he concluded that "the minority figure of 28.53% suggests substantial compliance for the industry." Report of the Interim Administrator Concerning the Compliance Reports ("Report") at 9.

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[2] On or about April 23, 1985, New York News Inc., the then-publisher of the New York *Daily News*, made a similar motion.

[3] By Order dated November 30, 1988, the Court prospectively suspended the 3:2 and 1:1 ratios of the Affirmative Action Program embodied in the Consent Decree.

On September 30, 1991, the Court issued an Opinion and Order in which it deferred consideration of defendants' motion to vacate the Decree in order that the concerns of the NAACP Legal Defense Fund (the "LDF") respecting the validity of the compliance reports could be addressed. In this regard, the Court indicated that three things would be required or allowed to happen before it again considered the pending motion: (1) each defendant company was to file an affidavit with the Administrator verifying the information contained in the previously filed compliance reports; (2) the LDF and the EEOC could undertake limited discovery concerning the compliance reports "[i]f plaintiffs feel that discovery on compliance continues to be warranted subsequent to such submissions;" and (3) the Administrator was to "conduct an evidentiary hearing following the close of discovery to determine the validity of defendants' compliance reports" "[i]f plaintiffs so request." Opinion and Order, dated Sept. 30, 1991, at 8.

On November 27, 1991, the Administrator provided the Court with a declaration under the penalty of perjury, in accordance with 28 U.S.C. § 1746, from each of the defendant companies, through an authorized agent, to the effect that the compliance reports consisted of and/or were based upon corporate business records.[4] Plaintiffs never availed themselves of the opportunity to conduct discovery of the defendant companies with respect to their compliance

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[4] The statements provided the Court on November 27, 1991 affirm the accuracy of the compliance reports. LDF's argument that no credence can be accorded to what it asserts are "unsworn" statements is unpersuasive. Defendants' statements affirming the accuracy of the compliance reports are declarations subscribed to under the penalty of perjury. By the plain terms of 28 U.S.C. § 1746, such statements are the equivalent of a sworn affidavit, having "like force and effect." Accordingly, in prescribing this verification procedure, the Administrator has established a sufficient basis for the compliance reports to be admitted into evidence and relied upon by the Court.

reports.[5] On April 2, 1992, Interim Administrator Ellis circulated a letter in which he indicated that the LDF did "not intend to conduct any further investigation concerning the compliance reports." The Interim Administrator's letter makes no reference to any request by the LDF for an evidentiary hearing concerning the validity of the compliance reports. On April 7, 1992, the Court restored the pending motion to modify or vacate the *Patterson* Consent Decree to its calendar for consideration.

This matter is presently before the Court on the motion of defendants Times, Maxwell Newspapers, Inc. ("Maxwell"), New York Post ("Post"), and the NMDU pursuant to paragraph 7 of the Consent Decree[6] and Rule 60(b), Fed.R.Civ.P.,[7] to vacate or modify the Consent Decree. For the reasons discussed below defendants' motion

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[5] The EEOC assures the Court that it was and is satisfied with the veracity of the compliance reports, and therefore does not object to a judicial determination that the Affirmative Action and Administrator provisions of the Consent Decree should be vacated. *See* EEOC Supp. Memo., dated May 26, 1992, at 1, 8 & n. 3.

[6] Paragraph 7 of the Final Order provides that this Court "retains continuing jurisdiction . . . for the purpose of enabling any of the parties to apply to the Court for such further orders and directions as may be necessary or appropriate."

[7] Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

to vacate is granted. The requests of the LDF and the EEOC for continuation of the Consent Decree's substantive provisions, as well as continuation of its existing enforcement mechanism or introduction of a new one, are denied.

## DISCUSSION

The principal purpose of the Consent Decree, which defendants entered "without admission by any defendant of a violation of Title VII . . . or . . . 42 U.S.C. § 1981, and without any finding by this Court that any defendant has discriminated against any person or persons because of race, color or national origin," was "to correct the . . . statistical imbalance [of minority individuals]" by "put[ting] minority individuals in the positions they would have occupied had the aforesaid statistical imbalance not existed." The Affirmative Action Program, with its implementation ratios for placement of minorities on Group III and Group I toward the end of attaining the 25% target, was the engine for achieving these purposes.

*Applicable Legal Standard*

The court's jurisdiction to vacate or modify the Consent Decree arises not only from the Consent Decree itself, but from Rule 60(b) of the Federal Rules of Civil Procedure and this Court's inherent equitable power over its decree in *United States v. Swift & Co.*, 286 U.S. 106, 114, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932), the Supreme Curt held that:

> Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.

Before exercising its power to modify or vacate a judicial decree, a court must be convinced by the party seeking relief that the purposes of the litigation as incorporated into the decree have been fully achieved. *See United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248, 88 S.Ct. 1496, 1499, 20 L.Ed.2d 562 (1968); *see also Rufo v. Inmates of Suffolk County Jail*, __ U.S. __, 112 S.Ct. 748, 758, 116 L.Ed.2d 867 (1992); *Board of Education of Oklahoma City Public Schools v. Dowell*, __ U.S. __, 111 S.Ct. 630, 636-37, 112 L.Ed.2d 715 (1991). Second Circuit authority is consistent with the case law cited above, recognizing the necessity for liberal modification of final judgments. *See e.g., New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 967-70 (2d Cir.). *cert. denied*, 464 U.S. 915, 104 S.Ct. 277, 78 L.Ed.2d 257 (1983) (modification power is "broad and flexible," and is appropriately exercised in light of changing factual circumstances; *Chance v. Board of Examiners*, 561 F.2d 1079, 1086 (2d Cir. 1977) (indicating that vacation of a consent decree is possible when"the purposes of the decree have been achieved.")

The EEOC maintains that this case is governed solely by *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed.999 (1932), and that *Dowell* and *Rufo* are inapplicable, so that the permanent injunction portions of the Consent Decree may not be dissolved without a clear showing of grievous harm evoked by new or unforeseen conditions. The Court cannot agree. In *Swift*, the Supreme Court stated:

> The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and

> unforeseen conditions should lead us to change [the decree.]

286 U.S. at 119, 52 S.Ct. at 464. Since *Swift*, however, the Court has placed less emphasis on the deleterious effects of a decree on the defendant and more on the continuing need for the injunction. In *Rufo*, after examining its "decisions since *Swift*," the Supreme Court specifically remarked "that the 'grievous wrong' language of *Swift* was not intended to take on an talismanic quality, warding off virtually all efforts to modify consent decrees." 112 S.Ct. at 758. The *Rufo* Court cited *United Shoe* for the proposition that *Swift* did not stiffen "the traditional flexible standard for modification of consent decrees." *Rufo*, 112 S.Ct. at 757-58. The Court noted:

> The *Swift* opinion pointedly distinguished the facts of that case from one in which genuine changes required modification of a consent decree, stating that:
>
> > "The distinction if between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.... The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be."

112 S.Ct. at 758.

The restraints imposed by the Decree in the instant case, unlike those at issue in *Swift*, were never intended to operate in perpetuity. Indeed, only paragraphs 1 and 2 are declared "permanent." The remaining provisions of the Decree were provisional only -- they were to last until the

vestiges of racial discrimination in the industry had been removed. As stated in the Consent Decree, the attainment of 25% minority employment industry-wide was the standard established for measuring compliance with this objective. Since the *Patterson* Consent Decree "involve[s] the supervision of changing conduct or conditions," *see Swift*, 286 U.S. at 114, 52 S.Ct. at 462, the Court concludes that the more rigid standard set forth in *Swift* is inapplicable and that the more flexible standard of demonstrating satisfaction of the Decree's purposes applies to the decision of whether to terminate or modify the Consent Decree.[8]

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[8]Moreover, as the Supreme Court has noted, the strict standard for modification or vacation of a consent decree announced in *Swift* should not be read out of context: the *Swift* consent decree evolved out of a prolonged antitrust battle between the Government and the meat-packing industry. *See Rufo*, 112 S.Ct. at 757. The Supreme Court, as well as lower federal courts, have distinguished *Swift* from cases arising in an institutional reform setting. Indeed, the Second Circuit has explained that where a decree is the product of institutional reform, an application for the modification of such decree "should . . . be viewed with generosity," and modified with "rather a free hand." *New York State Ass'n for Retarded Children*, 706 F.2d at 970-71.

While the institutional reform exception to the standard set forth in *Swift* apparently has only been invoked in cases where the conduct of a governmental facility or operation was being regulated pursuant to the decree, the Court concludes that such cases are analogous to the instant action, suggesting that the same flexible standard regarding vacation nor modification ought to apply. Unlike purely commercial consent decrees which involve only the parties to the subsisting litigation, this case, like those in the institutional reform arena -- wherein consent decrees were executed, for example, to correct unconstitutional conditions existing in persons or to remedy the existence of racial segregation in certain of the nation's schools -- implicates the public's interest in seeing that persons are not deprived of fundamental rights.

*Motion to Modify or Vacate the Consent Decree.*

The Administrator's statistical complication of September 17, 1991, which is drawn from the compliance reports, establishes that approximately seven months age minority representation among regular situation and Group I personnel industry-wide was 27,97%. See Letter of Interim Administrator Ellis to the Court, dated Sept. 17, 1991. Subsequent reports show that this level of minority employment has been maintained.[9] As the Court has often noted, minority representation in the membership of NMDU in the newspaper industry in metropolitan Nw York was less than 1% when the Consent Decree was issued in 1974. The present employment statistics indicate that the pervasive discrimination which caused the near total absence of minority opportunities in 1974 has vanished. The stated objective of the affirmative action program set forth in the Consent Decree— 25% minority employment industry-wide— has been achieved. The structure put in place in 1974 to achieve that end is now an unnecessary and expensive relic, and ought to be retired.[10]

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[9]The latest revised Quarterly Report of the Administrator, submitted May 26, 1992, indicates that minority representation in the industry represented by the NMDU was 27.78% as of March 30, 1992.

[10]The Court agrees with the Times that a foundation is now in place which suggests that minority representation in the industry will continue to increase, notwithstanding vacation of the Consent Decree, because of a "carryover" effect resulting from concentration of minorities in lower seniority positions on regular situation and Group I lists, coupled with increased voluntary attrition through retirement of more senior, predominantly non-minority NMDU personnel. For example, the Administrator's Report, dated September 9, 1991, demonstrates that while minorities hold only 11 of the first 100 positions on the Times' regular situation list, minority presence increases dramatically thereafter, minorities hold 45 of the positions numbered 100 through 199; 39 of the positions numbered 200 through

(continued...)

The LDF argues that the Consent Decree must continue in effect since it contains no expiration date applicable to its substantive provisions. Accordingly, the LDF contends that the parties intended the Consent Decree "to remain in force indefinitely" pending a judicial finding that "every facet" of defendants' operations is free of discrimination. LDF Memo., dated June 27, 1991, at 22. The LDF further submits that such a showing cannot be made at this time and, therefore, that the Consent Decree should remain in force with an Administrator at its helm for another five years.

The parties to the Settlement Agreement could not have intended that the Affirmative Action program and the Administrator provisions would be of infinite duration. Rather, it is clear that those provisions were to remain in place only as long as necessary to effectuate the goal of 25% minority employment in the industry represented by the NMDU. This intent is evidenced by the language of the settlement Agreement itself. For example, the Settlement Agreement specifically states that:

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[10](...continued)
299; and 22 of the positions numbered 300 through 367. In addition, roughly 50% of the times' Group I list is comprised of minorities. the situation at other employers is similar. Accordingly, the posture in which the Consent Decree leaves these lists virtually ensures, via retirements, deaths, buyouts, and attrition, increased minority presence in the industry after the Decree is vacated.

The fact that there are pending or completed proposals by the Times and Imperial Delivery Service, Inc. ("IDS") to purchase the assets of several defendant companies—whereby "28% of the regular situation and Group I positions covered by the Consent Decree will be under new ownership" ("Times Supp. Memo., dated may 1, 1992, at 7)—does not prevent the Court from concluding that the parties have shown compliance with the goal of 25% minority representation industry-wide. Indeed, it is likely that the buyouts offered employees in conjunction with these transactions will be exercised by many more senior employees, thereby accelerating minority movement up the lists.

> Any terms and provisions of any collective bargaining agreements between NMDU and any defendant employer which have been suspended by operation of the Order may be put into effect *when the Order terminates*, unless this Court orders otherwise.

Settlement Agreement at ¶33 (emphasis added.) Similarly, the Settlement Agreement did not intend that the Administrator's functions would continue indefinitely:

> The Administrator designated by the Court shall remain in office for an initial period of five (5) years after the date of entry of the Order ... and *he or his successor thereafter shall remain in office if and for such time as the court may direct.*

*Id.* at ¶ 6 (emphasis added).

The affirmative action plan embodied in the *Patterson* Consent Decree, like that approved by the Supreme Court in *United Steelworkers of America v. Weber*, 443 U.S. 193, 209, 99 S.Ct. 2721, 2730, 61 L.Ed.2d 480 (1979), was "not intended to maintain racial balance but simply to eliminate a manifest racial imbalance." To maintain the temporary affirmative action provisions provided for in the Settlement Agreement after they have served their stated purpose would not only be beyond the intent of the parties but would also infringe on the legitimate expectations of non-minority employees. In *EEOC v. Local 638 ... Local 28 of Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1186-87 (2d Cir. 1985), *Aff'd*, 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986), the Second Circuit, following the Supreme Court's decision in *United Steelworkers of America v. Weber*, held that "a temporary, race-conscious affirmative action remedy such as a membership goal" lasts "only until the effects of the past discrimination have been eliminated...." The purpose of the Consent Decree in the instant matter has been achieved—the 25% goal agreed to by all parties to the *Patterson* action with the intention of eliminating the effects of past

discrimination has been attained. The time has come for this Court to vacate the Consent Decree and allow the industry to self regulate subject, of course, to the laws preventing racial discrimination.[11]

*The LDF's Request for a Hearing*

The LDF argues that the Court may not terminate or modify the Consent Decree without a full evidentiary hearing. The LDF requests a hearing so that it may prove: (1) that the industry has committed numerous discriminatory acts and violations of the Settlement Agreement, even during the period while the motions to terminate were pending; (2) that the industry is not capable of self-policing; (3) that racial discrimination will escalate if the office of the Administrator is eliminated or other protections afforded by the Settlement Agreement are removed; (4) that an Administrator is desperately needed to protect the rights of minority workers and applicants; (5) that the labor market for jobs within the jurisdiction of the NMDU is now well over 50% minority and (6) that hiring ratios are still needed in order to prevent massive racial discrimination in hiring. LDF Memo., dated June 27, 1991, at 18-19.

Such a hearing, however, is neither required nor necessary. In the instant case, the Administrator, as well as the Court, has monitored compliance with the Settlement Agreement since its inception. With respect to the instant motion to vacate or terminate the Consent Decree, the parties have presented extensive arguments to this Court in

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[11]Moreover, the Court notes that the parties, in entering into the Consent Decree, could not have intended that defendants should be bound for all eternity to incur the expenses attendant to maintaining the office of the Administrator. Those expenses have been substantial — for example, the Administrator's fees and expenses for the period January 1975 through March 1985 totalled $575,773. See Aff. of Richard J. Jordan, Esq., Director of Labor Relations of the News, at ¶ 11 (annexed to News Memo., dated April 23, 1985).

various motion papers, at a conference held on May 30, 1991, and at a hearing held on February 23, 1987. There is, accordingly, a vast evidentiary foundation—both statistical and experiential—which this Court may explore in order to decide whether vacation of the Decree is appropriate.

Even assuming *arguendo*, the LDF's proposition that defendants have continued to violate the Consent Decree and that discrimination remains prevalent in the industry, such arguments are not relevant to defendants' application for vacation of the Consent Decree.[12] As this Court has stated previously:

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[12]Similarly irrelevant is the LDF's argument that 25% minority employment is not longer the appropriate goal given the current relevant labor market. In effect, the LDF asks the Court to ignore the bargained for goals as set forth in the Settlement Agreement—a goal negotiated by the parties and approved by the Court—simply because the goal was not achieved as of June 1, 1979. This the Court will not do. Although the parties set June 1, 1979 as a target date for attainment of the goal, in the event that the goal was not reached by June 1, the Settlement Agreement provides for the reappointment of an Administrator by this Court beyond that period. Surely, had the parties intended the goal to vary depending on the labor market pool in a particular year, they would have drafted an agreement to that effect.

LDF cites *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991), in which the Sixth Circuit reversed the District Court *sua sponte* termination of a consent decree and ordered the lower court to consider the possibility that the city's racial composition had changed to much since the date the decree was executed that the original hiring goal was obsolete. LDF's reliance on this case is misplaced. The consent decree there specifically directed the defendants to achieve minority representation in the work force consistent with minority representation in the relevant labor market. 925 F.2d at 956. Although a numerical minimum also was stated, the labor market "party" language in the decree furnished a basis for the conclusion that the minority goal fluctuates with changes in the labor market. No comparable language that would warrant a similar conclusion is present in the *Patterson* Consent Decree.

> The hearing will not be for the purposes plaintiff has suggested: i.e. to determine whether defendants have violated Title VII of the Civil rights Act of 1964 or the consent decree. If plaintiffs believe that defendants have violated the consent decree, they should apply to the Administrator for relief pursuant to the decree. If they believe that the decree was insufficient to end discrimination in the industry, they must bring a new action for the relief they seek. This Court cannot grant such relief by modifying the consent decree.

*Patterson v. NMDU*, 42 Empl. Prac. Dec. ¶ 36,722, at 45,281, 1986 WL 14976 (S.D.N.Y., December 15, 1986). The Court granted the LDF an opportunity to request an evidentiary hearing before the Administrator on the only fact relevant to the issue of whether to terminate the Consent Decree -- whether the 25% minority employment goal as been achieved. The LDF did not avail itself of that opportunity for over six months and cannot be heard to complain now.

To the extent that the LDF feels that discrimination in the industry continues, despite the attainment of the 25% goal, it is free to bring a new action for the relief it seeks. Indeed, if discrimination is as rampant as the LDF asserts after eighteen years of the Consent Decree, it would be manifest that the Decree has been "insufficient to end discrimination in the industry" and that the LDF should, consistent with the Court's ruling, "bring a new action for the relief [it] seek[s]."[13] *Id.* Because new suits may be directed

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[13]Title VII channels are open to any potential complainants. In addition, since 1987 the NMDU labor contracts have routinely included an anti-discrimination clause. As a result, minority employees throughout the industry can assert and pursue grievances arising from their employers' or the Union's asserted discriminatory conduct through the NMDU labor contracts's grievance procedure. Failure on the part of the Union to properly represent a grievant in

(continued...)

against the NMDU alone or particular employers, enterprises that have achieved substantial minority presence in their work forces and police themselves in other relevant respects need not be entangled in such litigation.

*Plaintiffs' Request that Certain Provisions be Retained*

The Times argues that the termination provisions of Paragraph 7, which provide the basis for extinguishing the Affirmative Action program, also apply to the remainder of the Consent Decree. The Times argues, therefore, that the Consent Decree must be vacated in its entirety. Both the EEOC and the LDF argue that each of the sections of the Settlement Agreement is independent and consequently, paragraphs 15, 17, 20, 21, 28, 29, 30, 33, and 41 should be retained, either in part or in their entirety, irrespective of the disposition of the other parts of the Settlement Agreement. *See* EEOC Memo., dated June 27, 1991, at 15-21; LDF Memo., dated June 27, 1991, at 34-37. Nothing in the Settlement Agreement, however, supports, this type of cut and paste approach. The Settlement Agreement is one cohesive document the goal of which was to increase minority employment in the industry to 25%. The Agreement created the mechanism by which to reach that goal. Again, the parties to the Consent Decree could not have envisioned that jurisdiction however would be retained indefinitely so as to establishing, in effect,a permanent system of court supervision of the industry—an ongoing burden of perhaps endless duration that should not be within the Court's ambit.

The Court, cannot agree with the argument of the EEOC that retention of certain of these provisions is

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[13](...continued)
such matters would permit the grievant to file charges with the National Labor Relations Board. Thus, an aggrieved employee also has the grievance and arbitration mechanism of the Collective Bargaining Agreement in the event a claim of discrimination arises.

necessary since the purpose of the consent decree extends beyond the goal of 25% minority employment to remedying and preventing nepotism, cronyism and word-of-mouth hiring. EEOC Reply Memo., dated aug. 19, 1991, at 4-9. The Settlement Agreement was obtained by the EEOC in the enforcement of Title VII with the express purpose of remedying and preventing race discrimination in the industry. Unless there is disparate impact on minority persons, nepotistic practices do not furnish the basis for finding a violation of Title VII. *See, e.g., Scott v. Pacific Maritime Ass'n.* 695 F.2d 1199, 1205-07 (9th Cir. 1980) (no violation of Title VII based on racial discrimination where plaintiffs failed to make prima facie showing of disparate impact in operation of union's permissive rule, providing that the son or daughter of a deceased longshoreman or clerk is to be granted Class B registration if he or she is the sole support of the deceased's widow and over the age of 18 years). Because minorities are not now underrepresented in the industry, nepotistic practices could, if they existed, advantage minority persons as much as non-minorities. The objective of the Consent Decree was the elimination of minority underprepresentation in the industry, and no more. Since the 25% goal has been attained, the Decree has served its purpose, and its vacation, consistent with the intent which accompanied its entry, is appropriate.

Nor is the retention of paragraphs 1 and 2 of the Settlement Agreement justified. those paragraphs parallel federal law and prohibit discrimination against individuals on the basis of race, color, or national origin. While it is true that paragraphs 1 and 2 purport to enjoin defendants "permanently," the enforceability of these provisions is qualified. Both begin with the phrase "[s]ubject to the provisions herein." Accordingly, defendants are permanently enjoined from committing discriminatory acts "subject to" the other provisions of the Consent Decree. The only intelligible construction of this "subject to" language is that the non-discrimination provisions are binding upon defendants as

long as the Consent Decree remains in effect—in other words, until the Court determines that the Consent Decree is no longer needed. In any event, paragraphs 1 and 2 do no more than prohibit conduct that is already prohibited by Title VII. Given this redundancy, there is no point in continuing those provisions after the remainder of the Consent Decree has been terminated."[14]

The fact that paragraphs 1 and 2 are designated "permanent" is not a proscription against their termination. As the Supreme Court noted in *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 298, 61 S.Ct. 552, 557, 85 L.Ed. 836 (1941):

> The Injunction which we sustain is "permanent" only for the temporary period for which it may last. It is justified only by the [the circumstances] that induced it and only so long as it counteracts [those circumstances]. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted.

Thus, the term "permanent" does not mean irrevocable in perpetuity, and the court has the power to vacate injunctive relief that nominally is "permanent."

Indeed, courts have indicated that permanent injunctive relief should be vacated when its requires nothing more than compliance with the law that was the source of its issuance. In *S.E.C. v. Warren*, 583 F.2d 115 (3d Cir. 1978), the Third Circuit ruled that the district court did not abuse its discretion in dissolving a permanent injunction which

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[14]The EEOC is mistaken in its contention that at a conference held on May 30, 1991, this Court indicated that it would not dissolve paragraphs 1 and 2 of the Consent Decree. The Court did not so rule, rather, it referred to the effective continuation of these provisions by the laws against discrimination.

contained a restraint from future violations of the Securities Exchange Act. The court noted that:

> In effect the injunction requires defendants to "obey the law" in the future "a requirement with which they must comply regardless of the injunction. Dissolution of the injunction decree removes the possibility of contempt proceedings in the event of a future violation; the right to prosecute ... civilly still exists.'

583 F.2d at 121. *See also Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 898 (5th Cir.), *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 56 L.Ed.2d 131 (1978) ("[t]he word 'discriminating' ... is too general. The provision is more specific than Title VII itself only in that it does not prohibit employment discrimination based on religion and natural origin ... Such 'obey the law' injunctions cannot be sustained").[15]

The terms and spirit of the Settlement Agreement, as well as the law of the case, dictate that the Consent Decree be extinguished upon attainment of the 25% target. That target having been attained, this Court hereby orders that the Consent Decree be vacated in its entirety. After eighteen years of Court and Administrator supervision, the goal has been achieved. Both equity and judicial economy dictate that the EEOC resume its role as the initial forum

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[15]The rationale for this principle is that an "obey the law" injunction is too vague to enforce under the standards of Rule 65, Fed.R.Civ.P., since contempt is a possible remedy for its violation. The Court of appeals for the Second Circuit has acknowledged that Rule 65(d) "reflects Congress' concerns with the dangers inherent in the threat of a contempt citation for violation of an order so vague that an enjoined party may unwittingly and unintentionally transcend its bounds." *Sanders v. Air Line Pilots Ass'n. Int'l.*, 473 F.2d 244, 247 (2d Cir. 1972) (citing *Int'l. Longshoremen's Ass'n. Local 1291 v. Philadelphia Marine Trade Ass'n.*, 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967).

for review of allegations of discrimination under Title VII. As the Court of Appeals for the Sixth Circuit stated in *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991):

> The concerns originally voiced in the decree may yet remain.... Yet our interest in seeing that the decree is not dissolved prematurely is coupled with a realization that not every wrong in the Cincinnati fire department can be righted by a decree which is now 17 years old, and the district court may find that other . . . litigation offers a better vehicle for addressing any alleged legal wrongs in the City's policies today once those initial goals have been achieved.

925 F.2d at 961-62 (footnote omitted). Like the court in *Youngblood*, this Court recognizes that the current Consent Decree may not offer the best solution to any ongoing concerns that today's victims of discrimination may voice."[16] *Id.* at 961.

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[16]The LDF's Offer of Proof, dated August 19, 1991, contains the declaration of 29 minority regular situation holders at the defendants Long Island News Co., Metropolitan News Co., the News, the Post, the Times, Newark Newsdealers Supply, Passaic County News, Westfair News, and Imperial News Co. These individuals make allegations of intentional discrimination in connection with assignment of work, discipline, compensation, selection of foremen, adjustment of routes following route consolidation, bidding, and tractor-trailer certification. Such assertions are not properly raised at this time. In December 1986, this Court instructed the LDF to prosecute alleged violations of the Consent Decree before the Administrator. Such matters are not to be raised for the first time in this proceeding. *See Patterson v. NMDU*, 42 Empl. Prac. Dec. ¶36,722, at 45,281, 1986 WL 14976 (S.D.N.Y. Dec. 15, 1986). Assuming, *arguendo*, that the declarants' accusations are true this Court reiterates that "not every wrong ... can be righted by a decree which is now [18] years old." 925 F.2d at 961. Other litigation may today offer a better vehicle for addressing any alleged legal wrongs.

It must be emphasized that the termination of the Consent Decree does not alter defendants' substantive legal obligation to obey the law. Nor does vacating the Consent Decree permit defendants to discriminate against minorities in employment decisions. Title VII and other similar laws remain in effect and are fully applicable to defendants. As in all other sectors of the economy, aggrieved individuals will be able to take any complaints they may have to the EEOC, and ultimately to the courts if appropriate, for processing.

*CONCLUSION*

The Consent Decree is hereby vacated in its entirety. In order to affect an orderly winding down of the Administrator's office he is instructed to hear and decide all claims that have been instituted prior to the date of this Order. Until such cases are disposed of the Administrator's services shall be continued, but for the sole purpose of completing said cases. This Court shall retain jurisdiction over any appeals from those claims. No new claims shall be initiated or processed.

SO ORDERED.

Nos. 73 Civ. 3058 (WCC).
73 Civ. 4278 (WCC).

United States District Court
S.D. New York.

JOHN E. PATTERSON, et al.,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK & VICINITY, *et. al.*,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants.

Sept. 30, 1992

OPINION AND ORDER

WILLIAM C. CONNER, District Judge:

This matter is presently before the Court on the motion of the NAACP Legal Defense Fund, pursuant to Rule 62(c), Fed.R.Civ.P., requesting that the Court stay its

Judgment Order of July 29, 1992[1] and restore the injunction of the *Patterson* Consent Decree pending appeal of that judgment to the Second Circuit Court of Appeals.

## BACKGROUND

A class of private plaintiffs and the Equal Employment Opportunity Commission (the "EEOC") brought two civil rights actions in 1973 against the Newspaper and Mail Deliverers' Union of New York and Vicinity (the "NMDU" or "Union") and more than fifty publishers and news distributors having collective bargaining agreements with the Union. Both suits charged that the Union, with the acquiescence of the publishers and distributors, had historically discriminated against minorities, and that the structure of the collective bargaining agreement, combined with nepotism and cronyism, had perpetuated the effects of past discrimination in violation of Title VII of the Civil Rights Act of 1964. Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in the newspaper delivery industry but for the alleged discriminatory practices.

On September 19, 1974, then-District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties and incorporating the Settlement Agreement in a Consent Decree, familiarity with which is presumed.[2] *See Patterson v. Newspaper and Mail Deliverers' Union*, 384 F.Supp. 585 (S.D.N.Y. 1974), *aff'd.* 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976). Paragraphs 1 and 2 of the

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[1] The LDF styles this as an application to stay the Court's July 8, 1992 Order even though its Notice of Appeal indicates the appeal is from the Judgment entered July 29, 1992. *See* Times Exh. A.

[2] The Settlement Agreement is divided into four sections: Equitable Relief (¶¶ 1-2). The Administrator (¶¶ 3-6), Affirmative Action Program (¶¶ 7-27), and General Provisions (¶¶ 28-42).

Consent Decree permanently enjoin both the Union and the defendant employers from engaging in "any act or practice which has the purpose or the effect of discriminating against any individual or class of individuals in their bargaining units represented by NMDU on the basis of race, color or national origin." The injunction provisions also prohibit all defendants from taking "any action which would deprive any such individual of equal employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color or national origin."

The Settlement Agreement established a goal of 25% minority employment in the industry within NMDU bargaining units. *See* Settlement Agreement at ¶ 7. That "goal" was defined as "not an inflexible quota but an objective to be achieved by the mobilization of available personnel and resources . . . in a good faith effort to maximize employment opportunities for minorities in the bargaining units in the industry represented by NMDU." *See* Settlement Agreement at ¶ 8. To achieve this goal the Settlement Agreement implements an affirmative action program which modifies the hiring procedures for newspaper deliverers under the industrywide collective bargaining agreement. Under the Consent Decree, each employer maintains a work force of regular situation holders for its minimum delivery needs. To accommodate fluctuations in circulation, the publishers are permitted to supplement their work force with daily shapers.

The daily shapers are divided into three groups with descending hiring priorities. Those shapers on the Group I list have first priority, after the regular situation holders, in order of their shop seniority. The next priority belongs to Group II shapers. Group II consists of all persons holding regular situations or Group I positions with other employers in the industry. Last in order of priority are the Group III shapers.

The Settlement Agreement provides for the orderly flow of Group III shapers into Group I, and from there, into regular situations. The Agreement mandates that for each non-minority Group III member elevated to Group I, a minority Group III member must also be elevated. Moreover, the Agreement requires that for every two non-minority persons added to the Group III list, three minority persons must be added. Through this process, it was intended that the proportion of minority workers in the industry would increase to the 25% goal by June 1979. *See* Settlement Agreement ¶¶ 11, 12, 15. When that goal was not reached by the specified date, he affirmative action provisions were extended, and later, extended again.

The Settlement Agreement also established an Administrator, appointed by the Court, to implement the provisions of the Consent Decree and supervise its performance. The Settlement Agreement authorizes the Administrator to hear claims concerning violations of the Decree. Appeals from his decisions are heard in this Court.

On April 17, 1985, the New York Times (the "Times") moved for an order, pursuant to Paragraph 7 of the Final Order and Judgment in this matter dated October 24, 1974, and Rule 60(b), Fed.R.Civ.P., to vacate or modify said Final Order and Judgment on the grounds that (1) the terms of the Final Order and Judgment have been satisfied; and (2) relief therefrom is justified under present circumstances.[3] On February 23, 1987, the Court held a hearing to consider defendants' motion to terminate the Settlement Agreement. At the conclusion of the hearing, the Court ruled from the bench that notwithstanding that some employers had reached or exceeded the 25% figure within their respective operations, the goal to be realized was "25% minority employment in the industry." *See* Hearing Transcript at 125.

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[3] On or about April 23, 1985, New York News Inc., the then-publisher of the New York Daily News, made a similar motion.

Accordingly, this Court deferred its decision on the motion to terminate the Decree until defendants could produce sufficient evidence to demonstrate that minority employment in the bargaining unit had reached 25% throughout the industry as a whole.[4]

On May 30, 1991, having reviewed compliance reports which indicated that the 25% goal had been met and exceeded, this Court restored defendants' motion to vacate the Consent Decree to its calendar. In order to aid it in rendering a decision, the Court directed the Interim Administrator to submit compliance reports of all defendant companies. On September 9, 1991, the Interim Administrator issued a Report in which he concluded that "the minority figure of 28.53% suggests substantial compliance for the industry." Report of the Interim Administrator Concerning the Compliance Reports ("Report") at 9.

On September 30, 1991, the Court issued an Opinion and Order in which it deferred consideration of defendants' motion to vacate the Decree in order that the concerns of the LDF respecting the validity of the compliance reports could be addressed. In this regard, the Court indicated that three things would be required or allowed to happen before it again considered the pending motion: (1) each defendant company was to file an affidavit with the Administrator verifying the information contained in the previously filed compliance reports; (2) the LDF and the EEOC could undertake limited discovery concerning the compliance reports "[i]f plaintiffs feel that discovery on compliance continues to be warranted subsequent to such submissions;" and (3) the Administrator was to "conduct an evidentiary hearing following the close of discovery to determine the

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[4] By Order dated November 30, 1988, the Court prospectively suspended the 3:2 and 1:1 ratios of the Affirmative Action Program embodied in the Consent Decree.

validity of defendants' compliance reports" "[i]f plaintiffs so request." Opinion and Order, dated Sept. 30, 1991, at 8.

On November 27, 1991, the Administrator provided the Court with a declaration under penalty of perjury, in accordance with 28 U.S.C. § 1746, from each of the defendant companies, through an authorized agent, to the effect that the compliance reports consisted of and/or were based upon corporate business records. Plaintiffs never availed themselves of the opportunity to conduct discovery of the defendant companies with respect to their compliance reports. On April 2, 1992, Interim Administrator Ellis circulated a letter in which he indicated that the LDF did "not intend to conduct any further investigation concerning the compliance reports." The Interim Administrator's letter makes no reference to any request by the LDF for an evidentiary hearing concerning the validity of the compliance reports. On April 7, 1992, the Court restored the pending motion to modify or vacate the *Patterson* Consent Decree to its calendar for consideration.

After some additional briefing, in an Opinion and Order dated July 8, 1992, this Court granted the motion of defendants Times, Maxwell Newspapers, Inc. ("Maxwell"), New York Post ("Post"), and the NMDU and terminated the Consent Decree in its entirety.[5] The Office of the Administrator was retained only to the extent necessary to complete the processing of claims filed prior to the date of the Order—no new claims were to be initiated or processed.

Subsequently, however, the LDF and the EEOC filed a joint motion pursuant to Rule 59(e), Fed.R.Civ.P., seeking to alter or amend the Judgment or Order, dated July 8, 1992. The motion sought to establish a thirty-day grace period in which individuals could file claims regarding matters that accrued prior to July 8, 1992. On July 29, 1992, following

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[5] Familiarity with the Court's Decision is presumed.

oral argument, the Court denied that motion, ruling instead that it would enter a Judgment Order authorizing the Administrator to hear and decide all claims instituted prior to July 29, 1992. The LDF filed a Notice of Appeal from the July 29, 1992 Judgment Order on August 28, 1992, and the EEOC filed a Notice of Appeal from that same Judgment Order on September 25, 1992.

## DISCUSSION

The LDF requests, pursuant to Rule 62(c), Fed.R.Civ.P., restoration of the Consent Decree pending appeal of the Judgment Order entered on July 29, 1992, vacating the Consent Decree and concomitant Settlement Agreement in their entirety.[6] The LDF alleges that since the termination of the Decree, various defendant employers and the NMDU have engaged in numerous discriminatory and retaliatory actions against minority employees with the intention of wearing them down and discouraging them from standing up for their rights. LDF Memo. at 6-11. Submitted to substantiate the allegations of the LDF are the Declarations of ten minority individuals.

Rule 62(c), Fed.R.Civ.P., provides in pertinent part:

> When an appeal is taken from in interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the

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[6] While the LDF's motion is titled "Motion to Restore Injunction Pending Appeal," a review of the Memorandum accompanying the motion evidences the LDF's intention to seek restoration of the entire Consent Decree, not simply Paragraphs 1 and 2, the permanent injunction provisions. *See* LDF Memo at 15 ("[N]on compliance requires the restoration of the decree—and particularly the permanent provisions in Part A and the administrative provisions in Part B—pending appeal.") The motion is thus more akin to one seeking reconsideration of the Court's prior decision terminating the Consent Decree in its entirety.

> pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Rule 62(c) is an exception to the general rule that jurisdiction passes to the appellate court once a timely notice of appeal is filed. The Rule "does not restore jurisdiction to the district court to adjudicate anew the merits of the case after either party has invoked its right of appeal and jurisdiction has passed to an appellate court." *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir.), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982). Rather, Rule 62(c) codifies the limited right of the trial court to grant only such relief as may be necessary to preserve the status quo pending an appeal where consent of the Circuit Court has not been obtained. *See Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Eastern Air Lines, Inc*, 847 F.2d 1014, 1018 (2d Cir. 1988); *New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 758-59 (2d Cir. 1977).

The LDF filed its appeal of the Judgment Order dated July 29, 1992 on August 28, 1992, thereby vesting in the Second Circuit Court of Appeals jurisdiction over the instant action. Accordingly, this Court may act only to maintain the status quo during pendency of that appeal. Because the status quo as of July 8, 1992, the date of the Court's Opinion and Order terminating the Decree, is that the Consent Decree is of no force and effect, restoration of the Decree based on allegations that the Union and some of the defendant employers have engaged in acts of discrimination subsequent to its termination would be beyond the authority of this Court. While the LDF's Rule 62(c) motion could be denied on this basis alone, the Court believes that a discussion of the Rule 62(c) standard as it applies to the facts of this case is instructive

The criteria to be used in determining whether an application under Rule 62(c) should be granted are much the

same as would be employed on application for a preliminary injunction. Thus, to secure the relief sought in the present case, the LDF must (1) make a strong showing that it is likely to succeed on the merits of the appeal; (2) establish that unless the Consent Decree is restored, the private plaintiffs will suffer irreparable injury; (3) show that restoration of the Decree's provisions will not substantially injure other parties interested in the proceeding; and (4) show that the public interest favors restoration of the Consent Decree. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987); *United States v. Int'l Brotherhood of Teamsters*, 728 F.Supp. 920, 923 (S.D.N.Y. 1989).

*A. Likelihood of Success on the Merits*

This Court adheres to the reasoning set forth in its Opinion and Order dated July 8, 1992, terminating the Consent Decree in its entirety. Accordingly, an extensive exposition of the reasons why the Court believes the LDF is not likely to succeed on the merits of its appeal is unnecessary, and the Court will confine itself to a few brief remarks on this point.

As the Court has noted previously, the Consent Decree was "designed to correct the . . . statistical imbalance [of minority individuals]" by "put[ting] minority individuals in the positions they would have occupied had the aforesaid statistical imbalance not existed." *See* Settlement Agreement, Whereas Clauses. The attainment of 25% minority employment industry-wide was the standard established for measuring compliance with this objective. Minority representation in the membership of the NMDU in the newspaper industry in metropolitan New York was less than 1% when the Consent Decree was issued in 1974. As of March 30, 1992, minority representation was proven to be 27.78% industry-wide. Thus, the stated objective of the affirmative action program set forth in the Consent Decree--25% minority employment industry-wide--has been achieved.

Finding that the purposes of the litigation as incorporated in the Consent Decree had been achieved, *see United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248, 88 S.Ct. 1496, 1499, 20 L.Ed.2d 562 (1968), this Court terminated the Decree.

Contrary to the apparent belief of the LDF, the Decree nowhere states that it should remain in effect until each and every claim of discrimination is resolved. *See* LDF Memo. at 17. Indeed, it is inconceivable that the defendants would have entered into an agreement, the termination of which depended solely upon the unilateral decisions of employees regarding whether or not to charge a given employer with acts of discrimination. Vacation of the Consent Decree, however, does not permit defendants to discriminate against minorities in employment decisions. Title VII and other similar laws remain in effect and are fully applicable to defendants. If subsequent events disclose continuing discrimination, the LDF has every right to proceed against the alleged wrongdoer(s) in a new action,

*B. Irreparable Injury*

Pointing to what it alleges to be discriminatory acts occurring in the workplaces of certain defendant employers, the LDF argues that the dissolution of the Consent Decree and the "freeing of defendants from its restraints and from the immediate, ongoing supervision of the Interim Administrator has already resulted in substantial injury to minority workers." LDF Memo. at 17. The LDF has failed to establish, however, that vacation of the Consent Decree leaves any minority individual irreparably harmed, if, in fact, it is later determined that the alleged conduct was unlawful. There are numerous avenues open to those individuals who allege that they have been the victims of discrimination: an individual may bring a claim before the EEOC; the New York State Division of Human Rights; an arbitrator under the applicable labor agreement, or the NLRB if the Union breaches its duty of fair representation by denying proper

access thereto; and, of course, the courts, without exhausting Title VII administrative requirements, by commencing an action under 42 U.S.C. § 1981.

The vague references to the alleged pressure on minorities to accept buyouts from their employers and the allegations that minorities are given less desirable jobs because of their race or in retaliation against those who speak out when things are not done by the rules do not suffice to convince the Court that irreparable harm will result if the Decree is not reinstated. Restoration of the Consent Decree would only afford the individuals allegedly discriminated against one more forum, albeit a familiar and convenient one, in which to pursue their claim.

*C. Injury to Other Parties if the Consent Decree is Restored*

It is no argument to say, as the LDF does, that mere compliance with the law will shield the defendants from any injury that may come to them from restoration of the Consent Decree. Such an argument overlooks the fact that under the terms of the Settlement Agreement, each defendant is responsible for its share of the costs of the Administrator's services, regardless of whether that particular defendant has been charged with, much less been proved to have committed, discriminatory acts. As this Court noted in its Opinion and Order dated July 8, 1992, the expenses attendant to maintaining the office of the Administrator are substantial. *See* Opinion at 12, 15, n. 11. Accordingly, the Court adheres to its belief that the more equitable solution--given the fact that the goal of 25% minority employment in the newspaper industry represented by the NMDU has been exceeded—is dissolution of the Consent Decree, so that those employers who have demonstrated an ability to police themselves may be freed from the expense of processing charges against other employers.

*D. The Public Interest*

The plaintiffs have not demonstrated that the public interest would be served by restoration of the Consent Decree. Public confidence in the law will be increased with the denial of the LDF's application, and, should it be warranted following the commencement of a new action, the design of a remedial scheme better suited to redressing continuing discrimination, if any, that may be proved thereafter.

## CONCLUSION

For the foregoing reasons, the LDF's motion to restore the Consent Decree pending appeal of the Judgment Order of this Court, dated July 29, 1992, is denied.